APPENDIX

SAMMY'S OF MOBILE, LTD., an Alabama Limited Partnership; Sammy's Management Company, Inc., an Alabama Corporation, Plaintiffs-Appellants,

v.

CITY OF MOBILE, a Body Corporate and Politic, Defendant-Appellee. J & B SOCIAL CLUB, # 1, INC., d.b.a. The Candy Store, Jennifer Q. Bodiford; et al., Plaintiffs-Appellants,

v.

The CITY OF MOBILE, ALABAMA, Defendant-Appellee.

No. 96-7073.

140 F.3d 993 (11th Cir. 1998)

United States Court of Appeals,

Eleventh Circuit.

May 8, 1998.

Before BIRCH, Circuit Judge, and HILL and KRAVITCH, Senior Circuit Judges.

HILL, Senior Circuit Judge:

The City of Mobile prohibits nude dancing in establishments licensed to sell liquor. Two clubs brought suit seeking an injunction prohibiting the City from enforcing its ordinance. The clubs claim the ordinance violates their rights under the First Amendment to the Constitution. The district court granted summary

judgment to the City. For the following reasons, we affirm.

I.

Ordinance 03-003[1] of the City of Mobile, Alabama provides:

> It shall be unlawful for any manager, officer, agent, servant, employee, or person in charge of any establishment within the City of Mobile or the police jurisdiction thereof, licensed to sell spirituous or vinous liquors or malt or brewed beverages under the laws of the State of Alabama, knowingly to exhibit, suffer, allow, permit, engage in, participate in, or be connected with, any motion picture, show, performance, or other presentation upon the licensed premises, which, in whole or in part, depicts nudity or sexual conducts or any simulation thereof.
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> Any person, firm or corporation convicted for violating this ordinance shall be fined not more than $500.00 and sentenced to imprisonment for a period not exceeding six months, at the discretion of the court trying the case.[2]

The preamble to the ordinance provides:

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1 The ordinance was enacted on February 6, 1996.

2 The ordinance defines "nudity" as:

> [T]he showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the darkened area surrounding the nipple, or the depiction of covered male genitals in a discernibly turgid state.

> WHEREAS, the City Council of the City of Mobile, Alabama, finds and declares that nudity and sexual conduct and depiction thereof, coupled with alcohol in public places, encourages undesirable behavior and is not in the interest of the public health, safety, and welfare.
>
> WHEREAS, the Council has chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell spiritous or vinous liquors or malt or brewed beverages.
>
> NOW, THEREFORE, the Council adopts this Ordinance pursuant to the powers under the Twenty-first Amendment to the Constitution of the United States delegated to it by the State of Alabama. *Id.*

Prior to the enactment of the ordinance, Sammy's of Mobile, Ltd., (Sammy's), and The Candy Store were licensed to sell alcoholic beverages for on-premises consumption and offered topless female dancing. Sammy's surrendered its liquor license after the passage of the ordinance, and continues to offer topless, as well as totally nude, dancing. The Candy Store has not surrendered its license and continues to provide topless dancing. Although the City has not yet enforced the ordinance against The Candy Store, the City has expressed an intent to do so.

Sammy's filed suit against the City in Alabama state court seeking declaratory and injunctive relief, and the City removed the action to federal district court. The complaint alleges that the ordinance is unenforceable

under the doctrine of equitable estoppel and that it violates the free speech clause of the First Amendment, the takings clause of the Fifth Amendment, the equal protection clause, both the substantive and procedural guarantees of the due process clause of the Fourteenth Amendment, and the ex post facto clause.

The Candy Store filed suit in federal district court seeking injunctive relief and damages, alleging that the ordinance violates the First Amendment, the Fifth Amendment, and the equal protection clause of the Fourteenth Amendment and that the ordinance is unenforceable under the doctrine of res judicata.[3]

The two cases were consolidated and all parties moved for summary judgment. The district court granted summary judgment to the City on all claims. The court concluded that the ordinance does not offend the First Amendment under the four-part test of *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), and that plaintiffs' remaining claims lack merit. Sammy's and The Candy Store appeal, contending that the district court erred in holding that the ordinance does not offend the First Amendment or the due process and equal protection clauses of the fourteenth Amendment. We review the district court's grant of summary judgment de novo. *Gordan v. Cochran*, 116 F.3d 1438, 1439 (11th Cir.1997).

II.

The Supreme Court has long upheld ordinances such as Mobile's. In *California v. LaRue*, 409 U.S. 109, 114, 93 S.Ct. 390, 395, 34 L.Ed.2d 342 (1972), the Court approved, as a valid exercise of the general police power,

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[3] The district court denied both Sammy's and The Candy Store's motions for injunctive relief.

an ordinance prohibiting nude dancing where liquor was sold. The Court found the "conclusion, embodied in these regulations, that certain sexual performances and the dispensing of liquor by the drink ought not to occur at premises that have licenses was not an irrational one." *Id.* at 118, 93 S.Ct. at 397. Since then, many similar ordinances have been approved, including several in this circuit. *See New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981); *City of Newport v. Iacobucci*, 479 U.S. 1047, 107 S.Ct. 913, 93 L.Ed.2d 862 (1987); *Lanier v. City of Newton*, 842 F.2d 253 (11th Cir.1988); *Int'l Eateries of America v. Broward County*, 941 F.2d 1157, 1162 (11th Cir.1991); *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943 (11th Cir.1982); *Cafe 207, Inc. v. St. Johns County*, 856 F.Supp. 641, 645 (M.D.Fla.1994), *aff'd per curiam*, 66 F.3d 272 (11th Cir.1995).

Although such ordinances regulate expressive conduct,[4] the Court has determined that they are content-neutral and should be reviewed under the intermediate level of scrutiny articulated in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570, 111 S.Ct. 2456, 2462-63, 115 L.Ed.2d 504 (1991). Under this test, an ordinance is constitutional if: (1) the interest served is within the power of the government; (2) the regulation furthers that interest; (3) the interest served is unrelated to free expression; and (4) there is no less restrictive alternative. *O'Brien* at 377, 88 S.Ct. at 1679 (quoted in *Barnes*, 501 U.S. at 567, 111 S.Ct. at 2461). In *Barnes*, the Court applied this test in upholding Indiana's

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[4] The Supreme Court has recognized that nude dancing may have some expressive content. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504 (1991).

prohibition on public nudity as applied to nude dancing. 501 U.S. at 570, 111 S.Ct. at 2462-63.

Recently, the Supreme Court has reaffirmed the precedential value of *LaRue* and the *Barnes-O'Brien* test. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). Although the Court disavowed the idea expressed in a long line of cases, including *LaRue*, that the Twenty-first Amendment lends an added presumption in favor of the validity of regulation of otherwise protected speech when it is at the site of the sale of alcoholic beverages, the Court observed that "[e]ntirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations." 517 U.S. at 515, 116 S.Ct. at 1514. This power is located in the inherent police power of every state to regulate to promote public decency. *Id.*

The Court also reaffirmed that the *Barnes-O'Brien* intermediate level of review applies to such ordinances. *Id.* Under this test, the Court concluded, even after *44 Liquormart*, *LaRue*, "would come out the same way." *Id.* We are informed by this guidance and agree with the district court that the *Barnes-O'Brien* test is applicable to the Mobile ordinance.[5]

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[5] The dissent rejects the application of *LaRue* and *Barnes* to the Mobile ordinance because it believes *44 Liquormart*, Inc. v. Rhode Island, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), "eviscerated" the rationale of *LaRue*. This conclusion is reached despite the fact that the Supreme Court in *44 Liquormart* specifically cautions us against just such a view. By expressing its opinion that *LaRue* would come out the same way, the Court may have hoped to forestall the view that *44 Liquormart* is the death knell for ordinances prohibiting nude entertainment in bars. The Court characterized the Twenty-first Amendment analysis of *LaRue* as merely a "buttress" to the conclusion that the First Amendment did not invalidate California's prohibition of certain grossly sexual exhibitions in

The district court held that the Mobile ordinance passes all these tests for a constitutional regulation of expressive conduct: the regulation of public health, safety, and morals is a valid and substantial state interest; the Mobile ordinance's statement of purpose and findings as to the problems created by the combination of alcohol and nude entertainment are sufficient to support the requirement that the regulation further this interest; this interest is unrelated to the suppression of free expression; and the ordinance is narrowly tailored to the perceived problem.

We agree. The preamble to the ordinance finds that nudity and sexually explicit entertainment coupled with alcohol in public places "encourages undesirable behavior and is not in the interest of public health, safety, and welfare." Thus, the ordinance is aimed at the very type of harm found to create a substantial government interest in *LaRue*, *Barnes*, International Eateries and a host of other cases. Furthermore, Mobile has a "reasonable basis" for believing that its ordinance will serve this substantial governmental interest. *See Int'l Eateries*, 941 F.2d at 1162. The district court located this reasonable basis in the experience of other cities, studies done in other cities, case law reciting findings on the issue, as well as their own wisdom and common sense. This is sufficient.[6] The Supreme Court has itself noted

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premises licensed to serve alcoholic beverages. 517 U.S. at 514-16, 116 S.Ct. at 1514. Although no longer buttressed by the added presumption of the Twenty-first Amendment, the Court was careful to remind us that such ordinances remain protected by the continued vitality of a long line of approving cases, including *LaRue* and *Barnes*.

[6] It is clear that under *Barnes*, there is no constitutional requirement that a city make particularized findings regarding the adverse effects of the combination of alcohol and nude entertainment. The Court noted that there were no findings nor any legislative history attached to the Indiana statute, but found the "statute's purpose

that "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." *Bellanca*, 452 U.S. at 718, 101 S.Ct. at 2601. Finally, the requirement that the dancers partially cover their breasts or cease to serve alcohol is certainly the least restriction possible which would still further the city's interest in controlling the combustible mixture of alcohol and nudity.

The dissent believes that the ordinance does not meet the third requirement of this test, i.e., that the city's interest be unrelated to the suppression of the message of nude dancing. Indeed, the dissent rejects the applicability of the *Barnes-O'Brien* test itself because it finds the Mobile ordinance to be a "content-based" regulation, subject to a "searching" level of scrutiny.[7]

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of protecting societal order and morality is clear from its text and history." 501 U.S. at 568, 111 S.Ct. at 2461. *See* also *Cafe 207, Inc. v. St. Johns County*, 856 F.Supp. 641, 645 (M.D.Fla.1994), aff'd per curiam, 66 F.3d 272 (11th Cir.1995) ("It is now established as a matter of law by Supreme Court jurisprudence culminating in [*Barnes*] that secondary effects of proscribed conduct may be taken into consideration by a court evaluating the governmental interests justifying impingement upon free speech rights even when, as in *Barnes*, there is no legislative history demonstrating that the lawmakers actually considered secondary effects or any other specific factor (such as protecting order and morality) in enacting the challenged law.").

[7] The dissent's argument that the *Barnes-O'Brien* test is inapposite because the Indiana statute there was content-neutral, whereas Mobile's ordinance is content-based, ignores the claim in *Barnes*. While Indiana's statute, on its face, prohibits public nudity rather than "expressive conduct," the claim in *Barnes* was not that the statute was facially invalid, but that it was unconstitutional as applied to nude dancing. There was no claim in *Barnes* that the statute was unconstitutional because it prohibited nudity simpliciter. The claim was that the statute was unconstitutional because it prohibited nude dancing. The same claim is made against the Mobile ordinance.

Characterizing Mobile's ordinance as content-based is a clear departure from prior cases holding that such ordinances are not aimed at the erotic message of nude dancing. For example, in *Barnes*, the Supreme Court held that Indiana's interest in prohibiting public nude dancing was "unrelated to the suppression of free expression." 501 U.S. at 570, 111 S.Ct. at 2463. The Court rejected the argument that merely because nude dancing may have some expressive content, an ordinance prohibiting such dancing must be aimed at the suppression of that content. The purpose of Indiana's statute was not to suppress the erotic message of nude dancing, but to address the evil of public nudity. *Id.* The Court concluded, "[i]t was not the dancing that was prohibited, but simply its being done in the nude." *Id. See* also *Buzzetti v. New York City*, 140 F.3d 134 (2d Cir.1998) (ordinance barring adult businesses from residential zones and certain other areas is a content-neutral and aimed at curbing negative effects of adult businesses on surrounding areas rather than seeking to suppress free expression).

We too have rejected the idea that ordinances aimed at nude entertainment are necessarily content-based. In holding such an ordinance to be a valid regulation of the time, place and manner of expressive conduct, we wrote:

The only restriction imposed by the ... ordinance is in terms of the place where nude dancing may be presented [i.e., only in places not serving alcohol]. This type of regulation has been recognized as independent of expressive or communicative elements of conduct in other

contexts. *Grand Faloon Tavern*, 670 F.2d at 947(emphasis added).[8]

Similarly, the Mobile ordinance does not seek to ban whatever message is conveyed by nude dancing. It does not even seek to ban nude dancing. In prohibiting nude dancing where liquor is sold, the ordinance restricts only the place or manner of nude dancing without regulating any particular message it might convey. No party disputes that the completely nude dancing which Sammy's, having surrendered its liquor license, now presents is legal under the ordinance. Nude dancing appears to be allowed everywhere in Mobile, except where alcohol is served. Mobile is attempting only to regulate the sale of alcohol in inappropriate places and it has determined that it is inappropriately sold in places where nude dancing is offered. Therefore, the ordinance is constitutional under the *Barnes-O'Brien* test.

Furthermore, the *Barnes-O'Brien* test applies to this ordinance even if it is not strictly content-neutral. It is true that not all dancing is prohibited in Mobile, only nude dancing where liquor is served. To that extent, the ordinance refers to the "content" of the dancing. The

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[8] Although the dissent relies heavily on our subsequent opinions in *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir.1985) and *Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir.1985), neither undermines *Grand Faloon's* premise that Mobile's ordinance is content-neutral. Both cases not only do not explicitly hold that regulations such as the one at bar are content-regulatory but also do not apply the strict scrutiny appropriate for content regulations. Instead, both *Krueger* and *Leverett* require only that cities demonstrate that ordinances such as Mobile's advance "legitimate interests" and struck down nude dancing ordinances because the records in those cases did not show that the ordinances furthered any legitimate government interest unrelated to the suppression of free expression. *See Krueger*, 759 F.2d at 855- 56; *Leverett*, 775 F.2d at 1540-41.

dissent, however, seems to equate this reference to content with content suppression. The dissent says, for example, that the ordinance is an "outright ban targeted solely at conduct protected by the First Amendment" and that, "on its face, it singles out nude entertainment and thus the erotic message conveyed by that conduct." [9]

The Supreme Court, however, does not equate reference to content with suppression of content. The Court applies the *Barnes-O'Brien* intermediate level of scrutiny to ordinances which distinguish between nude and clothed entertainment, but which are aimed only at the secondary effects of nude entertainment. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S.Ct. 925, 929, 89 L.Ed.2d 29 (1986) (ordinance "by its terms [was] designed to prevent crime, protect city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life"); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 n. 34, 96 S.Ct. 2440, 2453 n. 34, 49 L.Ed.2d 310 ("[i]t is [the] secondary effect [of crime and urban deterioration]

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[9] In fact, the dissent apparently rejects the idea that any such ordinance might ever be justified as an attempt to address the undesirable secondary effects of the commingling of alcohol and nudity because such ordinances are "content-based regulations of expressive behavior." For example, the dissent states that the reason we upheld the City of Pinellas Park's ordinance prohibiting nudity in the course of food and drink service in *Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir.1985), was "because the ordinance did not apply to protected expression, such as dancing." (emphasis added) To the dissent, any regulation of the place or manner of nude dancing is also necessarily a regulation of the content of such expression. This contention presupposes that all nude dancing conveys the same message, when, in fact, controversy rages both in academia and society at large as to whether nude dancing, films, and other such exhibitions express messages of liberation or submission. We cannot assume that any regulation addressing nude dancing is a content regulation.

which these zoning ordinances attempt to avoid, not the dissemination of 'offensive speech' ").

In *International Eateries*, we too upheld a city ordinance regulating nude dancing aimed at "protecting the quality of urban life from the secondary effects of adult businesses." 941 F.2d at 1162. Applying *Barnes-O'Brien* scrutiny, we concluded that the ordinance was valid because it furthered a substantial governmental interest in regulating these secondary effects. *Id. See* also *Buzzetti*, 140 F.3d 134.

Mobile also defends its ordinance as an attempt to combat the secondary effects of nude performance in a bar atmosphere. Just as the cities in *Renton, Young*, and *International Eateries*, it seeks, geographically, to separate adult entertainment establishments from other commercial establishments--in this case, bars--in order to minimize the secondary effects of that combination.

The dissent rejects this analogy. It believes these cases are inapposite because the zoning regulations therein were "content-neutral," as opposed to the "content-based" Mobile ordinance. The zoning ordinances in *Renton*, *Young*, and *International Eateries*, however, were not content-neutral. They treated adult theaters differently from other theaters. They were content-based to the same extent, and in exactly the same way, as the ordinance in Mobile which treats nude dancing differently from clothed dancing.[10]

Mobile is attempting to regulate the secondary effects of the combination of alcohol and nude dancing without prohibiting either. It does not seek to ban bars or nude dancing. Everyone can still buy a drink and watch

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[10] In fact, the clothes required are few--a g-string and pasties will satisfy the statute.

nude dancing in Mobile. They cannot, however, do both in the same place. The dissent seems to believe this may violate the rights of the people of Mobile, but we are unaware of any constitutional right to drink while watching nude dancing.[11] Accordingly, the judgment of the district court is AFFIRMED.

KRAVITCH, Senior Circuit Judge, dissenting:

Instead of enacting a generally applicable proscription on public nudity or a general prohibition on nudity in establishments licensed to serve alcohol, the City of Mobile chose to address "the combustible mixture of alcohol and nudity" by singling out traditionally protected forms of expression for criminal sanction. Although I agree with the majority that there is no "constitutional right to drink while watching nude dancing," the Constitution does confer a right to be free from government regulation that prohibits expressive conduct on the basis of content. Because I believe that the majority fundamentally misapprehends the restrictions that the First Amendment imposes upon governmental power to regulate expression, I respectfully dissent.

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[11] The reference in *44 Liquormart* to the proposition that government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially his interest in freedom of speech--does not apply to this case. In *44 Liquormart*, the Rhode Island ordinance banned liquor price advertising. The ordinance, therefore, did not regulate the time, place, or manner, but rather totally suppressed the commercial speech involved. The Court merely reaffirmed that a state may not ban truthful, nonmisleading commercial speech, the Twenty-first Amendment notwithstanding. Mobile has not banned nude dancing. In *LaRue*, the Court noted that "... the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." 409 U.S. at 118, 93 S.Ct. at 397.

I.

A.

Preliminarily, I take issue with the majority's apparent assumption that because Ordinance 03-003 does not ban nude dancing outright, but rather merely conditions the right to present entertainment involving nudity on the surrender of a liquor license, the Ordinance does not significantly burden the exercise of First Amendment rights. The majority's reasoning ignores the well- established proposition that

> "[e]ven though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right. In *Perry v. Sindermann*, 408 U.S. 593[, 597], 92 S.Ct. 2694[, 2697], 33 L.Ed.2d 570 (1972), relying on a host of cases applying that principle during the preceding quarter-century, the Court explained that government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially his interest in freedom of speech."

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 513, 116 S.Ct. 1495, 1513, 134 L.Ed.2d 711 (1996) (internal citation omitted). Although the City may regulate the sale or service of alcohol, it may not condition the conferral of a liquor license--to which appellants concede they are not constitutionally entitled--on the forfeiture of the right to engage in expressive

behavior.[1] Because the City authorizes the punishment, by fine or imprisonment, of licensees who "exhibit, suffer, allow, permit, engage in, participate in, or [are] connected with" one form of expressive behavior, the challenged ordinance imposes a significant burden upon First Amendment freedoms.[2]

B.

In denying appellants' respective motions for preliminary injunctive relief, the district court relied upon "a long line of [Twenty-first Amendment] cases upholding the states' authority to prohibit nude dancing in clubs licensed to sell alcohol."[3] After the district court entered the preliminary orders, but before the court ruled on the parties' motions for summary judgment, the Supreme Court *decided 44 Liquormart, Inc. v. Rhode*

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[1] The majority concedes that it is well established that "nude dancing ... is expressive conduct within the outer perimeters of the First Amendment...." *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 566, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504 (1991).

[2] I disagree with the majority's conclusion that the "reference in *44 Liquormart* to the proposition that government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests ... does not apply to this case." The applicability of the unconstitutional conditions doctrine does not turn on whether conferral of the discretionary benefit is conditioned upon completely foregoing the right to engage in expression or instead upon foregoing the right to engage in that expression in certain places or manners or at certain times. Rather, the doctrine applies as long as the governmental actor demands some sacrifice of a constitutional right in exchange for an otherwise discretionary benefit. *See FCC v. League of Women Voters*, 468 U.S. 364, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984) (invalidating provision of Public Broadcasting Act that prohibited noncommercial educational television stations that received public funds from endorsing candidates or editorializing); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) (holding that constitutionally protected speech is impermissible ground for discharge from public employment).

[3] Summary Judgment Order ("Order") at 6.

Island, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), which dispelled definitively the notion that the Twenty-first Amendment "qualif[ies] the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." *Id.* at 516, 116 S.Ct. at 1515. The district court recognized that *44 Liquormart* foreclosed the argument that the Twenty-first Amendment "provides an added presumption in favor of validity of state regulation in the area of topless dancing,"[4] but nevertheless concluded that the case "provided us with the roadmap for upholding" such state regulation.[5] In *44 Liquormart, the Court cited Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), for the proposition that states enjoy the power "to restrict ... 'bacchanalian revelries' ... regardless of whether alcoholic beverages are involved." *44 Liquormart*, at 515, 116 S.Ct. at 1514 (citing *Barnes* and quoting *California v. LaRue*, 409 U.S. 109, 118, 93 S.Ct. 390, 397, 34 L.Ed.2d 342 (1972)). The district court interpreted this reference in *44 Liquormart* to mean that *Barnes* controls all First Amendment challenges to ordinances regulating nudity.

Following the district court's lead, the majority, although conceding that *44 Liquormart* requires application of First Amendment scrutiny to the ordinance in question, suggests that *44 Liquormart* confirms the City's power to regulate nude dancing in establishments licensed to sell alcohol. The majority concludes that the Court's treatment in *44 Liquormart* of earlier First Amendment cases involving state regulation of alcohol and nude dancing provides support for the conclusion that Ordinance 03-003 does not offend the First Amendment. In *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), one of those earlier cases, the Court upheld a regulation of nude dancing in establishments

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4 Order at 8 (internal quotations omitted).

5 Id.

serving alcohol on the basis of the authority conferred upon states by the Twenty-first Amendment. In *44 Liquormart*, the Court, "[w]ithout questioning the holding in *LaRue*, ... disavow[ed] its reasoning insofar as it relied on the Twenty-first Amendment." 517 U.S. at 516, 116 S.Ct. at 1514. Because the Court in *44 Liquormart* stated in dicta that *LaRue* would have been resolved the same way had the Court not relied erroneously upon the Twenty-first Amendment, *see 44 Liquormart*, at 515, 116 S.Ct. at 1514 ("We are now persuaded that the Court's analysis in *LaRue* would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment."), the majority concludes that Ordinance 03-003 likewise should survive First Amendment scrutiny.

This case presents this circuit's first occasion to address the impact of *44 Liquormart* on state power to regulate nude dancing and the continued vitality of *LaRue*. In *LaRue*, the Court addressed the constitutionality of California Department of Alcoholic Beverage Control regulations that prohibited various forms of sexual conduct in licensed establishments. The Court, noting that "[t]he state regulations here challenged come to us, not in the context of censoring a dramatic performance in a theater, but rather in a context of licensing bars and nightclubs to sell liquor by the drink," *LaRue*, 409 U.S. at 114, 93 S.Ct. at 395, reviewed the regulations under a standard considerably more deferential than it ordinarily reviews prohibitions targeted at protected expressive behavior. In light of what the Court believed to be "the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires," *id.* at 118-19, 93 S.Ct. at 397, the Court decided that the Department's regulations were not "irrational" or "unreasonable," *id.* at 116, 93 S.Ct. at 396. The Court's discussion of the state's authority to regulate conduct with a communicative

element, however, is hard to square with later decisions. The Court in *LaRue* stated:

> While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink. *Id.* at 118, 93 S.Ct. at 397. Precedent now makes clear that a state cannot condition a benefit on a forfeiture of First Amendment rights, *see 44 Liquormart*, at 512-14, 116 S.Ct. at 1513, or regulate the time, place, or manner of protected expression with content-based prohibitions, *see Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989) ("[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech ....' " (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984))). Although the *44 Liquormart* Court, in dicta, did not disturb the holding of *LaRue*, the Court eviscerated the basis for that decision. The *44 Liquormart* Court squarely addressed whether the Twenty-first Amendment "qualif[ies] the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment," 517 U.S. at 516, 116 S.Ct. at 1515, but it did not have before it, as did the Court in *LaRue* and as does our court now, a regulation prohibiting nude dancing in establishments with liquor licenses. The Court therefore had no occasion to evaluate closely the constitutionality of such an ordinance.[6] Unlike the

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[6] N.Y. State Liquor Auth. v. *Bellanca*, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981), and Newport v. Iacobucci, 479

majority, I do not believe that the dicta in *44 Liquormart* compels us to uphold the ordinance challenged here.

C.

The majority reads *44 Liquormart* to require this court to review the challenged ordinance under the intermediate scrutiny applied in United States v. *O'Brien*,

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U.S. 92, 107 S.Ct. 383, 93 L.Ed.2d 334 (1986), cited by the majority, likewise cannot provide support for the regulatory authority the City seeks to exercise. In *Bellanca*, the Court upheld a statute prohibiting nude dancing in establishments licensed to sell liquor. The sole basis of the Court's holding, however, was the power that it believed the Twenty-first Amendment conferred upon states to regulate alcohol. The Court concluded that "[j]udged by the standards announced in *LaRue* and *Doran* [*v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), which followed *LaRue*], the statute at issue here is not unconstitutional." 452 U.S. at 717, 101 S.Ct. at 2601. Relying upon a greater-includes- the-lesser rationale that has since been discredited, *see 44 Liquormart*, at 510-12, 116 S.Ct. at 1512; infra Section I.C, at note 7, the Court reasoned that the "State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs," *Bellanca*, 452 U.S. at 717, 101 S.Ct. at 2601, and that "[w]hatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment," *id.* at 718, 101 S.Ct. at 2602. *Bellanca* thus rests upon a jurisprudential underpinning no longer followed by the Court. Likewise, the Court in Iacobucci, following *LaRue* and *Bellanca*, upheld an ordinance prohibiting "performing nude or nearly nude" in establishments licensed to sell liquor. 479 U.S. at 93 n. 1, 107 S.Ct. at 384 n. 1. The sole rationale advanced by the Court in upholding the regulation was the power that the Court believed the Twenty-first Amendment conferred upon states to regulate alcohol. *See id.* at 97, 107 S.Ct. at 386 (" 'Given the added presumption in favor of the validity of the ... regulation in this area that the Twenty-first Amendment requires,' it is plain that, as in *Bellanca*, the interest in maintaining order outweighs the interest in free expression by dancing nude.") (quoting *LaRue*, 409 U.S. at 118-19, 93 S.Ct. at 397). After *44 Liquormart*, *Bellanca* and *Iacobucci* appear to lack precedential value.

391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). *O'Brien* scrutiny is appropriate when a generally applicable regulation not directed at the communicative elements of conduct nevertheless infringes rights of free expression. *See O'Brien*, 391 U.S. at 376-77, 88 S.Ct. at 1678-79. *O'Brien* scrutiny involves the application of a four-part test:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377, 88 S.Ct. at 1679. The majority concludes that the Supreme Court's decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), which reviewed under *O'Brien* scrutiny a challenge to Indiana's prohibition on public nudity as applied to nude dancing, controls the case sub judice and accordingly that this court should apply the *O'Brien* four-part test.

In *Barnes*, the Court addressed the constitutionality of Indiana's "prohibition against complete nudity in public places," 501 U.S. at 564, 111 S.Ct. at 2459, as applied to establishments that provide totally nude dancing as entertainment. The Court, although recognizing that nude dancing "is expressive conduct within the outer perimeters of the First Amendment, though ... only marginally so," *id.* at 566, 111 S.Ct. at 2460, concluded that the law was valid because it was supported by a state interest in protecting

order and morality, was not targeted at "the erotic message conveyed by the dancers," and imposed requirements no greater than those necessary to serve the state interest, *id.* at 567-572, 111 S.Ct. at 2461-63.

Barnes, however, does not control the case sub judice. The statute challenged in *Barnes*, although using the identical definition of "nudity" as the ordinance challenged here, did not single out one form of expression for disfavored treatment. The Indiana statute provided:

> A person who knowingly or intentionally, in a public place: (1) engages in sexual intercourse; (2) engages in deviate sexual conduct; (3) appears in a state of nudity; or (4) fondles the genitals of himself or another person; commits public indecency, a Class A misdemeanor.

Ind.Code s 35-45-4-1 (1988), quoted in *Barnes*, 501 U.S. at 569 n. 2, 111 S.Ct. at 2462 n. 2. In contrast, the ordinance challenged here makes it unlawful "knowingly to exhibit, suffer, allow, permit, engage in, participate in, or be connected with, any motion picture, show, performance, or other presentation upon the licensed premises, which, in whole or in part, depicts nudity or sexual conduct or any simulation thereof." City of Mobile Ord. 03-003 (emphasis added). Unlike the statute upheld in *Barnes*, which focused on nudity simpliciter and not on forms of expressive conduct or the messages they convey, the City of Mobile ordinance applies only to forms of conduct that are inherently--and traditionally--communicative: motion pictures, shows, performances, and "other presentation[s]." *Cf. Int'l Eateries of Am. v. Broward County*, 941 F.2d 1157, 1161 (11th Cir.1991) (noting distinction between generally applicable, content-neutral regulations and those prohibiting conduct

"precisely because of its communicative attributes") (quoting *Barnes*, 501 U.S. at 577, 111 S.Ct. at 2466 (Scalia, J., concurring in the judgment) (emphasis omitted)), cert. denied, 503 U.S. 920, 112 S.Ct. 1294, 117 L.Ed.2d 517 (1992). A regulation that by its terms prohibits only traditional forms of expression cannot be said to be unrelated "to the suppression of free expression within the meaning of *O'Brien* ... [and thus is] outside of *O'Brien* 's test altogether." *Texas v. Johnson*, 491 U.S. 397, 410, 109 S.Ct. 2533, 2543, 105 L.Ed.2d 342 (1989).[7]

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[7] En route to concluding that *O'Brien* intermediate scrutiny controls the case before us, the majority argues that the as-applied challenge in *Barnes* was simply a claim that the Indiana statute "was unconstitutional because it prohibited nude dancing" and thus that the claim in *Barnes* was the "same claim [that] is made against the Mobile ordinance." With all due respect, I believe that the majority misapprehends the difference between an as-applied challenge to a content-neutral regulation and a facial challenge to a content-based regulation. The statute challenged in *Barnes* did not by its terms specifically proscribe nude dancing, but rather prohibited all public nudity--and thereby incidentally prohibited some otherwise lawful expression. That the claim raised by the respondents in that case sounded in the First Amendment does not mean that their claim was identical to the one made by appellants in the case before us. Courts long have distinguished between content- based regulations targeted at expression, on the one hand, and generally applicable, content-neutral regulations that incidentally burden expressive freedoms, on the other. *See generally L. Tribe, American Constitutional Law* §§ 12-2, 12-3 (1988). Simply because it is within governmental power to accomplish a particular end, such as a categorical ban on nudity that a fortiori includes a more specific ban on nude dancing, does not mean that any means chosen will satisfy the requirements of the First Amendment. Rather, the First Amendment often requires courts to invalidate regulations that accomplish ends that lawfully could be achieved by different means. *Compare Texas v. Johnson*, 491 U.S. 397, 406-410, 109 S.Ct. 2533, 2540- 2543, 105 L.Ed.2d 342 (1989) (invalidating state law that prohibited "desecration of venerated object[s]," because by singling out symbolic objects for protection, the state's asserted interest was implicated only when "a person's treatment of the flag communicates some message"), with *O'Brien*, 391 U.S. at 370, 88 S.Ct. at 1675 (upholding conviction for burning

This court often has distinguished regulations proscribing nudity per se, including general proscriptions on nudity in particular fora, from regulations targeted at expressive conduct. In *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943 (11th Cir.1982), we upheld a city ordinance banning nudity on premises where alcohol was served. The ordinance, unlike the one before us now, did not single out nudity in "any motion picture, show, performance, or other presentation," but rather simply banned all nudity in establishments offering alcohol for sale. *See id.* at 944 n. 2. Because the regulation thus was not targeted at traditionally expressive behavior, we applied *O'Brien* scrutiny and upheld the ban. In *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir.1985), however, we invalidated a ban almost identical to that in *Grand Faloon* because, unlike the ban in *Grand Faloon*, which was supported by a legitimate and substantial government interest in regulating activities likely to lead to breaches of the peace, the record demonstrated that the city's motive was to restrict expression. 759 F.2d at 855-56. Both cases addressed regulations that facially banned all nudity in establishments licensed to serve alcohol, rather than solely nudity in the course of traditionally expressive forms of conduct. *See Krueger*, 759 F.2d at 853-54 n. 3; *Grand Faloon*, 670 F.2d at 944 n. 2.

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draft card under statute that proscribed "knowingly destroy[ing]" or "knowingly mutilat[ing]" a Selective Service Registration certificate). Indeed, the First Amendment stands in part for the proposition that the greater power--in this case, the authority to regulate nudity--does not always include the lesser power--in this case, the authority to ban solely expressive conduct involving nudity. *See 44 Liquormart*, at 512, 116 S.Ct. at 1512 (rejecting greater-includes-the-lesser reading of the First Amendment and stating that "[t]he text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct").

Ordinance 03-003 on its face singles out nude entertainment and thus the "erotic message conveyed" by that conduct. *Barnes*, 501 U.S. at 570, 111 S.Ct. at 2463. Ordinance 03-003 would not by its terms apply, for example, to a nude waitress serving drinks at a licensed establishment or to a patron entering such a club nude, whereas it would apply to a production of "Hair" or "Equus"--or any other artistic production that includes nudity, however minor or incidental--at a club licensed to sell alcohol. Cf. *Barnes*, 501 U.S. at 585 n. 2, 111 S.Ct. at 2470 n. 2 (Souter, J., concurring in the judgment) ("It is difficult to *see* ... how the enforcement of Indiana's statute against nudity in a production of 'Hair' or 'Equus' somewhere other than an 'adult' theater would further the State's interest in avoiding harmful secondary effects...."). Instead of targeting nudity per se, which clearly is a permissible exercise of municipal or state authority, *see Barnes*, *supra*, the Mobile ordinance targets only conduct with communicative elements.[8] Because courts consistently have reviewed such contentbased restrictions with a level of scrutiny more searching than *O'Brien* scrutiny, which we have applied to generally applicable, content-neutral regulations, the majority is incorrect to conclude, simply because the claim before the court is a

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[8] The majority suggests that "[w]e cannot assume that any regulation addressing nude dancing is a content regulation," because "controversy rages both in academia and society at large" over what precise message nude dancing conveys. I would have thought, however, that an ordinance targeted at communicative activities that express multiple messages is as invidious as, if not more so than, an ordinance that targets merely one message. One need only consider a simple example to *see* how subversive of basic First Amendment values the majority's reasoning is: an ordinance banning all dancing would suppress a wide array of messages that could be conveyed by dancing, yet, according to the majority, that regulation would be permissible because "we cannot assume" that it targets any one particular message.

challenge to a nudity ordinance, that *Barnes* 's *O'Brien* scrutiny is appropriate in this case.[9]

D.

Because I believe that the majority applies the wrong level of scrutiny, I address the City's argument that time, place, and manner scrutiny--another form of intermediate scrutiny--is applicable in this case. In my view, in determining the appropriate level of scrutiny, this court should look to the character of the regulation. If the regulation is content-based--because it singles out one form of expression for disfavored treatment--then searching scrutiny is appropriate. *See Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 1164, 99 L.Ed.2d 333 (1988). If, on the other hand, the regulation is content-neutral--because it is justified not by "reference to the content of the regulated speech," *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976), but rather to the "secondary effects" of that speech, *see Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47, 106 S.Ct. 925, 929, 89 L.Ed.2d 29 (1986)--then

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[9] Moreover, contrary to the majority's unsupported assertion, the Court in *44 Liquormart* did not suggest that *Barnes*'s *O'Brien* scrutiny should apply in all cases involving ordinances regulating nudity. Instead, the Court merely cited *Barnes* to support the statement that "the Court has recognized that the States' inherent police powers provide ample authority to restrict the kind of 'bacchanalian revelries' described in the *LaRue* opinion regardless of whether alcoholic beverages are involved." *44 Liquormart*, at 515, 116 S.Ct. at 1514. I doubt that the Court, in announcing a decision that restricted governmental power to regulate speech, meant to suggest that courts now should evaluate content- based regulations under the more-deferential *O'Brien* standard of review. Instead, the Court's citation to *Barnes* merely confirms that states and municipalities presumptively may regulate nudity with generally applicable, content-neutral ordinances--ordinances wholly unlike that passed by the City in this case.

less-searching time, place, and manner scrutiny may be appropriate, *see id.* at 46, 106 S.Ct. at 928.

The City contends, and the majority agrees, that the Ordinance was not promulgated because of a disagreement with the message conveyed by nude dancing, but rather was an attempt to regulate the secondary effects of nude dancing. The City and the majority rely upon *Renton*, *supra*, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), and *Int'l Eateries of Am. v. Broward County*, 941 F.2d 1157, 1161 (11th Cir.1991), cert. denied, 503 U.S. 920, 112 S.Ct. 1294, 117 L.Ed.2d 517 (1992). In *Renton* and *Young*, the Court upheld zoning ordinances restricting the permissible locations for adult theaters that presented nude dancing. Although the regulations challenged in those cases "treat[ed] theaters that specialize in adult films differently from other kinds of theaters," *Renton*, 475 U.S. at 47, 106 S.Ct. at 929, and thus at first blush seemed to be content-based, the Court in each case concluded that the regulations were justified without reference to the content of the regulated speech because they were "aimed not at the content of the films ..., but rather at the secondary effects of such theaters on the surrounding community," *id.* (emphasis in original); *accord Young*, 427 U.S. at 71 n. 34, 96 S.Ct. at 2453 n. 34. In *Renton*, for example, the Court upheld the district court's conclusion that the "city's pursuit of its zoning interests here was unrelated to the suppression of free expression" because the Court believed that the ordinance "by its terms [was] designed to prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life." 475 U.S. at 48, 106 S.Ct. at 929; *accord Young*, 427 U.S. at 71 n. 34, 96 S.Ct. at 2453 n. 34 (noting that "[i]t is [the] secondary effect [of crime and urban deterioration] which these zoning ordinances

attempt to avoid, not the dissemination of 'offensive' speech").

In *International Eateries*, this court applied *Renton* to uphold a local zoning ordinance restricting the permissible locations for clubs presenting non-obscene nude dancing. Applying time, place, and manner scrutiny, this court concluded that the challenged ordinance: (1) furthered a substantial governmental interest in "protecting the quality of urban life from the secondary effects of adult businesses," 941 F.2d at 1162; (2) was narrowly tailored to further that interest because it focused only on those businesses likely to cause secondary effects, *id.* at 1163; and (3) allowed reasonable alternative avenues of communication because there were "sufficient alternative locations" where the theaters could lawfully operate, *id.* at 1165.[10]

The significant difference between the ordinance challenged in International Eateries and the one challenged here, however, is that the former was a zoning ordinance, whereas the one in the case before us is a direct regulation of expressive conduct.[11] Closely read, *Renton*, *Young*, and *International Eateries* apply only to zoning ordinances. *See Renton*, 475 U.S. at 49, 106 S.Ct. at 929-30 ("[Z]oning ordinances designed to combat the undesirable secondary effects of such businesses are to be

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[10] We applied the Renton secondary-effects analysis in International Eateries because at issue was the validity of a zoning ordinance similar to that considered in *Renton* and *Young*. *See* 941 F.2d at 1161. Distinguishing *Barnes*, we concluded that *O'Brien* scrutiny was inappropriate because the regulation "single[d] out nude dancing rather than broadly prohibiting all public nudity." *Id.*

[11] Contrary to the majority's suggestion, Ordinance 03-003 does not seek "geographically [ ] to separate adult entertainment establishments from other commercial establishments." (Emphasis added). Instead, the Ordinance seeks categorically to ban nude dancing in establishments-- wherever they may be located--that serve alcohol.

reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations.") (emphasis added); Young, 427 U.S. at 71, 96 S.Ct. at 2453 ("[W]hat is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited...."); *Int'l Eateries*, 941 F.2d at 1159 ("[T]he Supreme Court has held that under some circumstances cities may enact zoning ordinances that require adult movie theatres to locate only in certain areas, provided that the purpose of the regulation is to control the secondary effects of these businesses.") (emphasis added) (internal quotation omitted); *see* also *Buzzetti v. City of New York*, 140 F.3d 134 (2d Cir.1998) (upholding city's "Zoning Amendment," which "does not forbid the operation of any category of business [but i]nstead ... restricts the areas in which certain sexually-oriented businesses may operate"). Indeed, zoning regulations are amenable to time, place, and manner scrutiny at least in part because, although they restrict the locations available for a given use, they generally leave some areas open for the disfavored use. *See Renton*, 475 U.S. at 54, 106 S.Ct. at 932 ("[The City has] sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning."); *Young*, 427 U.S. at 71 n. 35, 96 S.Ct. at 2453 n. 35.

Unlike the zoning ordinances upheld in *Young*, *Renton*, and *International Eateries*, which preserved for adult entertainment "ample, accessible real estate," *Renton*, 475 U.S. at 53, 106 S.Ct. at 932, the City of Mobile's regulation prohibits establishments that wish to serve alcohol and present nude dancing from operating anywhere. Of course, as the City and the majority point out, appellants are free to provide nude dancing at their current locations as long as they are willing to forego the privilege of serving alcohol. As already stated, however,

see supra Section I.A, this argument ignores the well-established proposition that government may not condition the "conferral of [a] benefit ... on the surrender of a constitutional right." *44 Liquormart*, at 513, 116 S.Ct. at 1513. Although the Supreme Court and this circuit have upheld zoning regulations that, as measures of social policy, have dissipated or segregated the effects of adult theaters, neither has, without relying on a now-discredited view of the Twenty- first Amendment, upheld an outright ban targeted solely at conduct protected by the First Amendment.[12] Because I conclude that the secondary-effects exception is inapplicable in this case, I believe that this court should analyze Ordinance 03-003 as a content-based restriction.

E.

My conclusion that Ordinance 03-003 is a content-based restriction on protected expression that must be evaluated under searching judicial scrutiny finds strong support in case law. This court has distinguished between

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[12] In *Barnes*, Justice Souter argued in his concurrence that Indiana could justify application of a generally applicable proscription of public nudity to nude dancing because the state has a legitimate and substantial government interest in combatting the secondary effects of adult entertainment. His concurrence, however, simply sought to justify the burden on First Amendment freedoms imposed by application of a content- neutral statute to expressive behavior--a result contemplated by *O'Brien*--and did not suggest that a prohibition, other than a zoning regulation, targeted at expressive behavior could be justified by reference to the secondary effects of the targeted behavior. Likewise, in *Cafe 207, Inc. v. St. Johns County*, 66 F.3d 272 (11th Cir.1995), *aff'g* 856 F.Supp. 641 (M.D.Fla.1994), this court affirmed the district court's conclusion that the governmental-interest prong of the *O'Brien* test was satisfied because, inter alia, the regulation combatted the secondary effects of nudity in adult entertainment. 856 F.Supp. at 644. Like the statute in *Barnes*, the ordinance challenged in *Cafe 207* was a generally applicable, and not a content-based, prohibition on public nudity. The majority's reliance on *Cafe 207* thus is misplaced.

regulations of nudity that permissibly (and incidentally) burden protected expression and regulations that impermissibly target protected expression for sanction. In *Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir.1985), this court upheld against a First Amendment challenge an ordinance prohibiting nudity in the course of food and drink service because the ordinance did not apply to protected expression, such as dancing. *See id.* at 1540. The court struck down a companion ordinance that prohibited "nude or semi-nude entertainment in any commercial establishment," *id.* at 1537 (emphasis added); however, because, as a direct regulation of conduct protected by the First Amendment, the court subjected it to "the stricter standard typically used to review an infringement on a protected liberty interest justified solely under the government's police power," *id.* at 1540 (*citing Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir.1985)). The court noted that in order to justify a content-based regulation of protected expression, the city had an obligation to "come forth with more than simply an articulation of some legitimate interest that the city could have had to justify its prohibition." *Leverett*, 775 F.2d at 1540 (internal quotations omitted).[13] Although the conclusory language contained in the ordinances that "competitive commercial exploitation of nudity is adverse to the public health, peace, morals and good order, and [that] it is in the best interest of the public health, safety and convenience to restrict such nudity ...," *id.* at 1539, was sufficient to justify the ordinance generally proscribing nudity in the course of food service because that ordinance did not "on its face govern activity

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[13] *See Leverett*, 775 F.2d at 1540 ("When a fundamental interest such as freedom of expression is regulated, the City must also show that the legitimate concern it articulates has 'more than merely speculative factual grounds, and that it was actually a motivating factor in the passage of the legislation.' ") (*quoting Krueger v. City of Pensacola*, 759 F.2d 851, 855 (11th Cir.1985)).

protected by the First Amendment," *id.* at 1540, the language could not save the ordinance prohibiting nude entertainment.

The ordinance invalidated in *Leverett*, which was targeted solely at expressive conduct, is indistinguishable from the one challenged here. *See also BSA, Inc. v. King County*, 804 F.2d 1104, 1107-08 (9th Cir.1986) (enjoining operation of statute explicitly banning "common barroom type topless dancing" because the "[p]rohibition of a category of protected expression, including that which is sexually explicit, can be upheld only where it furthers a substantial governmental interest unrelated to suppression of free expression ... and where the governmental interest could not be served by a means less intrusive on First Amendment activity"). I am convinced that this court should review Ordinance 03-003, as well, under "the stricter standard typically used to review an infringement on a protected liberty interest justified solely under the government's police power." *Leverett*, 775 F.2d at 1540.

F.

In my view, the City has not satisfied this stricter standard. To survive First Amendment scrutiny, the City must, at a minimum, demonstrate that its interest in regulating the conduct at issue in this case "is based on something other than a desire to censor the communication because of the community's dislike of its content." *Krueger*, 759 F.2d at 854. The City argues that it acted to address the adverse secondary effects of nude dancing combined with alcohol consumption and that the preamble to Ordinance 03-003 makes clear that the City was not targeting the message of the expressive conduct, but rather was combatting the secondary effects of that

behavior.[14] The interests stated in the Ordinance's preamble--discouraging "undesirable behavior" and avoiding "disturbances"--are, of course, legitimate governmental interests. As in *Leverett*, however, "the City has made no showing as to the factual basis for its articulated concerns and the motivation for passage of [the ordinance] beyond the conclusions stated in the ordinance itself," 775 F.2d at 1540, a showing that is insufficient to "justify its infringement on protected expression," *id.* The majority concludes that the City permissibly relied upon other cities' findings that the commingling of alcohol and nudity produces undesirable effects. Although the majority is correct that "[t]he First Amendment does not require a city, before enacting [a zoning] ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses," *Renton*, 475 U.S. at 51, 106 S.Ct. at 931 (emphasis added),[15] this court consistently has required a

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[14] Indeed, an argument by the City that it was worried about the effects of adult entertainment alone, as was the city in *Renton*, 475 U.S. at 50, 106 S.Ct. at 930, rather than the effects of the entertainment combined with alcohol consumption, would be unconvincing because the City still permits nude dancing; Sammy's has been presenting nude dancing (without alcohol) since this litigation began, yet has not violated Ordinance 03-003.

[15] *Accord Int'l Eateries*, 941 F.2d at 1162 (holding that a city "need not conduct its own studies" in order to "have a reasonable basis for its belief that the harm to be protected against [by the zoning ordinance] in fact exists"). Likewise, the proof requirements for regulations that are not targeted at expression may be relaxed. *See Barnes*, 501 U.S. at 584-85, 111 S.Ct. at 2470 (Souter, J., concurring in the judgment) ("[L]egislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects.... I do not believe that a State is required affirmatively to undertake to litigate this issue repeatedly in every case."). *But cf. Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 135-36 (6th Cir.1994) (holding that "because the City has failed to demonstrate a link between nudity in non-adult entertainment and secondary effects,

significantly stronger showing to justify content-based regulations of expressive behavior outside of the zoning context, *see, e.g., Leverett*, 775 F.2d at 1540. The mere assertion, unsupported by any legislative findings, that a city seeks to address the undesirable secondary effects of a disfavored activity is insufficient to justify a regulation that by its terms prohibits only conduct that is protected by the First Amendment.

Even if the City had made findings, moreover, I have serious doubts that the City's interest in discouraging undesirable behavior and avoiding disturbances would be sufficient to justify Ordinance 03-003's content-based restriction. Furthermore, given the availability of alternative regulatory means that could accomplish the City's avowed goals without singling out protected expression for sanction, *see* infra Section II, in my view Ordinance 03-003 could not satisfy the means scrutiny that the First Amendment requires. I therefore would hold that the district court erred in granting summary judgment in favor of the City on appellants' First Amendment claim and that the district court should have granted summary judgment in favor of appellants on their facial challenge to Ordinance 03-003.

II.

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we do agree with the district court that the Akron ordinance must be struck down as facially unconstitutional under the First Amendment overbreadth doctrine"; stating that "[t]he ordinance makes no attempt to regulate only those expressive activities associated with harmful secondary effects and includes no limiting provisions"). Contrary to the majority's suggestion however, this court never has allowed a state or municipality to enact a content-based restriction on expression based upon a mere showing that other localities have identified an evil to be addressed.

This court does not have before it a generally applicable proscription on public nudity, see, e.g., *Barnes*, 501 U.S. at 569 n. 2, 111 S.Ct. at 2462 n. 2, or a general prohibition on nudity in establishments licensed to serve alcohol that is not limited solely to expressive conduct, *see, e.g., Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943, 944 n. 2 (11th Cir.1982). Presumably, either of those approaches would have accomplished the City's avowed goals and survived First Amendment scrutiny.[16] Instead, the City of Mobile chose to address the problems associated with "nudity, sexual conduct [,] and [the] depiction thereof[ ] coupled with alcohol in public places," City of Mobile Ord. 03-003, by subjecting to criminal sanction only activity clearly recognized to be within the protection of the First Amendment. Because I believe that the First Amendment prohibits the City of Mobile from enacting such a regulation and that the majority has misapplied long-established First Amendment principles, I respectfully DISSENT.

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[16] Of course, these approaches could fail First Amendment scrutiny if they were merely intended to mask a governmental motive to suppress protected expression. *See Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir.1985).

J & B SOCIAL CLUB # 1, INC. d/b/a The Candy Store and Jennifer Q. Bodiford,

Plaintiffs,

v.

The CITY OF MOBILE, Defendant.

Civil Action No. 96-0246-BH-S.

966 F.Supp. 1131 (S.D. ala. 1996)

United States District Court,

S.D. Alabama,

Southern Division.

October 2, 1996.

ORDER

HAND, Senior District Judge.

This consolidated action, originally filed as two cases, is before the court on plaintiff Sammy's of Mobile, Ltd.'s (hereinafter "Sammy's") motion for summary judgment (doc. 43) and plaintiffs J & B Social Club # 1, Inc. d/b/a The Candy Store (hereinafter "The Candy Store") and Jennifer Bodiford's motion for summary judgment (doc. 44). Each motion challenges the constitutionality of Ordinance 03-003, enacted by the Mobile City Council. The defendant City of Mobile has filed a cross motion for summary judgment against both sets of plaintiffs (doc. 46).

This action implicitly raises two important issues regarding governmental power: first, at what

governmental level--local, state, or federal--should issues such as liquor and nudity regulation be addressed; and second, whether these issues should be decided by legislative institutions or by the courts. In essence, the plaintiffs seek to have this court, pursuant to national authority, overturn the legislative will, expressed through its duly-elected representatives, of the City of Mobile.

The court will not approach these issues in the abstract, for this case presents a concrete controversy between the plaintiffs and the defendant. The judicial resolution of this controversy requires the application of the law, not the policy choices of presiding judge. Therefore, this ruling has nothing to say about the wisdom of the city's ordinance, only whether the ordinance is forbidden by the United States Constitution.

PROCEDURAL BACKGROUND

On February 6, 1996, the City Council of Mobile enacted Ordinance 03-003, which, at its core, bans topless dancing in bars. Sammy's filed a complaint against the city in state court which was removed to this court on February 26, 1996. The complaint alleged that the ordinance violated the First Amendment free speech clause, the Fifth Amendment "takings clause," the equal protection clause of the Fourteenth Amendment, the substantive and procedural components of the due process clause of the Fourteenth Amendment, the ex post facto clause, was void for vagueness, and finally was unenforceable under the doctrine of equitable estoppel.[1] Simultaneously with the filing of the complaint, Sammy's moved for a temporary restraining order against the enforcement of the ordinance. After an evidentiary hearing on March 1, 1996, that motion was denied on March 6, 1996.

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[1] Everything but the kitchen sink.

On March 12, 1996, The Candy Store filed a separate action against the city alleging that the same ordinance violates the First Amendment, the Fifth Amendment, is void for vagueness, is overbroad, violates the equal protection clause of the Fourteenth Amendment in that male breasts are treated differently from female breasts,[2] that the city intends to selectively enforce the ordinance, also in violation of the equal protection clause of the Fourteenth Amendment, and that the ordinance is unenforceable against The Candy Store under the doctrine of res judicata. The Candy Store, which seeks $2,000,000 in damages against the city, also filed a motion for a restraining order against the enforcement of Ordinance 03-003. After an evidentiary hearing on March 19 and 20, 1996, the court denied the plaintiffs' motion for an injunction against the city on March 26, 1996.

The two cases were consolidated under this civil action number on April 23, 1996. At a status conference meeting on August 12, 1996, the parties informed the court that they expected the issues presented in these lawsuits to involve primarily questions of law, and that the cases were amenable to summary judgment. On August 14, 1996, at the parties' requests, the court scheduled a shortened time period for the filing of summary judgment motions and responses. On September 5, 1996, the court heard oral argument from the parties on their respective motions for summary judgment. The motions are now ripe for review.

"Summary judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex*

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2 The complaint was amended to add this theory.

Corp. v. Catrett, 477 U.S. 317, 322-28, 106 S.Ct. 2548, 2552-55, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-53, 106 S.Ct. 2505, 2509-12, 91 L.Ed.2d 202 (1986). As indicated, legal issues predominate over factual ones in this action. Having reviewed the record, the court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On February 6, 1996, the Defendant City of Mobile enacted Ordinance 03-003 which, inter alia, bans topless female dancing in bars. City of Mobile Ordinance 03-003.

2. Prior to the ordinance being enacted, both plaintiffs were licensed to sell alcoholic beverages for on-premises consumption and offered topless female dancing. Dep. of Daniel Zimmern, at pp. 11-12; Trans. of Prelim. Inj. H'rg. on March 19-20, 1996, at pp. 118-120.

3. Daniel Zimmern, Vice-President of Sammy's Management Company, was notified of Ordinance 03-003 and had an opportunity to be heard at the Mobile City Council Meeting on February 6, 1996, when the ordinance was enacted. He declined to speak against the ordinance on the advice of the ordinance's legislative sponsor. Trans. of Prelim. Inj. H'rg. on March 6, 1996, at pp. 15-18, 20-23, 42.

4. Sammy's surrendered their liquor license in April, 1996. Zimmern Dep. at pp. 17, 18, 22, 23. Sammy's continues to offer expressive female dancing, though the dancers are now given the option of dancing totally nude, as well as simply topless. Zimmern Dep. at pp. 27-30 and 92-94.

5. The City of Mobile has not enforced Ordinance 03-003 against The Candy Store and Jennifer Bodiford. Letter of Slade Watson, dated August 1, 1996.

6. The city has expressed an intent to enforce the ordinance against bars offering topless female dancing, and has given no indication that it would enforce the ordinance against any other persons or entities. Trans. of Prelim. Inj. H'rg. on March 19-20, 1996, at pp. 45-46.

LEGAL CONCLUSIONS

A. FIRST AMENDMENT

Both plaintiffs claim that the city ordinance impermissibly curtails their First Amendment free speech rights. The First Amendment to the U.S. Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Although the free speech clause of the amendment makes no mention of protecting conduct from congressional regulation, the Supreme Court has held on numerous occasions that, "[W]here the government prohibits conduct precisely because of its communicative attributes, we hold the regulation unconstitutional." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 577, 111 S.Ct. 2456, 2466, 115 L.Ed.2d 504 (1991) (Scalia, J., concurring).

In its previous order of March 6, 1996, this court denied Sammy's motion for a temporary restraining order,

finding that the ordinance "falls within a long line of cases upholding the states' authority to prohibit nude dancing in clubs licensed to sell alcohol." *See e.g., New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718, 101 S.Ct. 2599, 2601, 69 L.Ed.2d 357, 361 (1981); *City of Newport, Kentucky v. Iacobucci*, 479 U.S. 92, 107 S.Ct. 383, 93 L.Ed.2d 334 (1986); *Lanier v. City of Newton, Ala.*, 842 F.2d 253 (11th Cir.1988).

Since the entry of the March 6, 1996, order, the Supreme Court rendered a decision in *44 Liquormart, Inc. v. Rhode Island*, --- U.S. ---- 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996),[3] an unrelated First Amendment case. The plaintiffs contend that this decision "completely change[s] the 'playing field' " regarding the appropriate disposition of their First Amendment claim.[4] *44 Liquormart*, a commercial speech case, held, inter alia, that "the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." *id.* --- U.S. at ----, 116 S.Ct. at 1515. *Prior to 44 Liquormart*, the Court had held, in a series of cases beginning with California v. *LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), that the Twenty-first Amendment could serve to buttress the constitutionality of liquor regulations that potentially infringed upon First Amendment rights. *See e.g., LaRue*, 409 U.S. at 114, 93 S.Ct. at 395 ("[T]he broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals."); *Doran v. Salem*, 422 U.S. 922, 932, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648 (1975) ("[T]he broad powers of the States to regulate the sale of liquor,

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3 Decided May 13, 1996.

4 Plaintiff's Sammy's of Mobile, LTD., Dispositive Motion for Summary Judgment and Memorandum of Points and Authorities, at p. 4.

conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a state could therefore ban such dancing as a part of its liquor license program.") (summarizing *LaRue*); *Bellanca*, 452 U.S. at 718, 101 S.Ct. at 2602 (holding that the broad powers conferred under the Twenty-first Amendment outweighed any "artistic or communicative value" attributable to topless dancing); *Iacobucci*, 479 U.S. at 95, 107 S.Ct. at 385 (holding that the states' Twenty-first Amendment regulatory authority "includes the power to ban nude dancing as part of a liquor license program."); *Lanier*, at 255 ("[S]tate regulation adopted pursuant to the twenty-first amendment enjoys a presumption of validity.") (citing *LaRue*) (citations omitted). The suggestion in all these cases that the Twenty-first Amendment was a font of some sort of "super authority" above and beyond the considerable police powers retained by the States and which "trumped" the First Amendment when liquor regulation was at issue was clearly rejected in *44 Liquormart.*[5]

After *44 Liquormart*, the Twenty-first Amendment no longer provides an "added presumption" in favor of validity of state regulation in the area of topless dancing. However, the same Court which restricted the "broad authority" under the Twenty-first Amendment--and thus undercut the rationale of the cases cited above--went to great pains to preserve the holdings of those very cases. *44 Liquormart* states:

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[5] The inference that Twenty-first Amendment conferred a "super police power" upon the States was untenable both with the plain language of the amendment and with the foundational principle that the states delegated only certain powers to the federal government and retained all others, including the police powers, for themselves. *See e.g., The Federalist, # 45; see also U.S. Constitution, Amendment X.*

> We are now persuaded that the Court's analysis in *LaRue* would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment. Entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations ... Without questioning the holding in *LaRue*, we now disavow its reasoning insofar as it relied on the Twenty-first Amendment.

Id., --- U.S. at ----, 116 S.Ct. at 1514. Indeed, the Court provided us with the roadmap for upholding the result in *LaRue*, citing two cases which upheld state regulation in this area without any involvement of alcoholic beverages. *id.*, --- U.S. at ----, 116 S.Ct. at 1514 (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976)) (upholding a zoning ordinance separating "adult" theaters from residential neighborhoods and churches) and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (upholding an Indiana public indecency statute which applied in the context of barroom topless female dancing).

Insofar as *Glen Theatre* dealt with a nudity statute, while American Mini Theatres dealt with a zoning ordinance, it appears that the *Glen Theatre* analysis is more applicable here, although the tests under both cases are remarkably similar.[6] Before beginning with the First Amendment analysis outlined in *Glen Theatre*, it is

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[6] As the court noted in *Glen Theatre*, the "time, place, or manner" test utilized in *American Mini Theatres and Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) "has been interpreted to embody much the same standards as those set forth in *United States v. O'Brien*." *Glen Theatre*, 501 U.S. at 566, 111 S.Ct. at 2460.

appropriate[7] to point out how this case is different from *Glen Theatre*. The ordinance at issue here does not ban certain forms of nudity, as did the Indiana statute in *Glen Theatre*, it only restricts the sale of alcoholic beverages in places where certain forms of nude entertainment, most commonly topless female dancing, are offered. Counsel for Sammy's contends that the limited nature of the city's

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[7] It is also worth mentioning how the Court has traditionally gone out of its way to distinguish between political and other forms of idea- oriented speech and forms of communication involving nudity or other sexually explicit expression. For example, in *LaRue*, the court indicated that the regulations sought to be struck down were aimed at performances that "partake more of gross sexuality than of communication." *LaRue*, 409 U.S. at 118, 93 S.Ct. at 397. Later, in American Mini Theatres, after indicating that society's interest in protecting the expression of eroticism is of a "wholly different, and lesser, magnitude than the interest in untrammeled political debate," the Court noted that, "few of us would march our sons and daughters off to war to preserve the citizens right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." *id.*, 427 U.S. at 70, 96 S.Ct. at 2452. In *Doran*, the Court stated in hardly a clear-cut fashion: "[A]lthough the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v. LaRue* that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances." *Doran*, 422 U.S. at 932, 95 S.Ct. at 2568 (citations omitted) (emphasis added). Finally, in the first case where the issue was squarely addressed, the court stated that, "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." *Glen Theatre*, 501 U.S. at 565, 111 S.Ct. at 2459. Hardly a case involving potential First Amendment protection of sexually explicit communication goes by without the Court purposefully going out of its way to belittle, or at least downgrade, the very constitutional protection these same cases purport to provide. While such language is puzzling insofar as the applicable First Amendment "test" is unchanged regardless of whether the relevant speech is fully protected or only marginally protected within the outer perimeters of the First Amendment. At the very least, such equivocation ought not to engender any sense of confidence in the plaintiffs.

ordinance makes it a content-based restriction and thereby invites strict scrutiny. Sammy's argument, however, is belied by the facts of their own operation. In an effort to comply with the ordinance, Sammy's has given up its liquor license and no longer serves alcohol on its premises. Yet it continues to offer topless dancing and has even expanded its menu of artistic/expressive communication to include completely nude dancing. There is no dispute that the ideas now being communicated at Sammy's are completely legal under the ordinance. The ordinance, therefore, is not a content-based restriction on naked expressive dancing, but rather is an attempt to regulate the commingling of such expression with intoxicating beverages. In this regard, the ordinance is less restrictive of expression than the one at issue in *Glen Theatre*.

With the Twenty-first Amendment no longer involved, *Glen Theatre* instructs that the proper First Amendment analysis for cases such as this one is the four-part test developed in *U.S. v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). *O'Brien* held that expressive conduct can be validly regulated if (1) the regulation is a legitimate exercise of authority, (2) it furthers an important or substantial governmental interest, (3) the governmental interest is unrelated to the suppression of free speech, and (4) the restriction of First Amendment rights is no greater than necessary to further the government's interest.

Applying the first part of this test to the nude dancing at issue in *Glen Theatre*, the Court stated that the Indiana public indecency statute is "clearly within the constitutional power of the State." 501 U.S. at 567, 111 S.Ct. at 2461. Likewise, Alabama's police powers having

been delegated to the city of Mobile,[8] the ordinance at issue here is clearly within the city's authority to enact.

The next part of the test asks whether the regulation furthers an important governmental interest. In *Glen Theatre*, the Court noted that it was impossible to discern Indiana's purpose in passing the indecency statute, but the plurality of the court was willing to infer that the statute's purpose was the protection of societal order and morality and that the law furthered this purpose. Justice Souter, concurring, acknowledged the soundness of this inference, but nevertheless preferred to rest his concurrence on the "State's substantial interest in combating the secondary effects of adult entertainment establishments." 501 U.S. at 582, 111 S.Ct. at 2468. The city's preamble makes clear that its purpose is to discourage undesirable behavior and to protect the public health, safety, and welfare. This stated purposes combines elements of both the societal order and morality rationale as well as the discouragement of adverse secondary effects.

Counsel for both plaintiffs implicitly argue that the city's asserted interest in controlling "undesirable behavior" is really a sham. Plaintiffs contend that because no evidence of "adverse secondary effects" has been advanced by the city, the ordinance does not "further" the city's alleged interest. In short, because there has been no empirical evidence advanced by the city to justify its finding, counsel for Sammy's argues that the ordinance is "clearly content based, with no proper predicate and has resulted in nothing more than a discriminatory violation of plaintiff's civil rights." Sammy's brief, at p. 11.

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[8] *Lanier v. City of Newton, Ala.*, 842 F.2d 253 (11th Cir.1988).

It is axiomatic that the motives of individual legislators are irrelevant to the constitutional challenge here. *See e.g., O'Brien*, 391 U.S. at 383-384, 88 S.Ct. at 1681-1682. The question remains whether legislative findings must be supported by specific evidence or studies. Of course, if one assumes, as did the plurality in *Glen Theatre*, that societal order and morality are legitimate, substantial governmental interests,[9] then the city's ordinance would satisfy the second part of the *O'Brien* test. Even under Justice Souter's *Glen Theatre* concurrence, which preferred to view the governmental interest as the prevention of secondary effects, the city would not be required to advance specific evidence to justify the ordinance. Indiana's post hoc assertion in its brief that its indecency statute was aimed at controlling prostitution, sexual assaults, and other criminal activity, was enough "evidence" for Justice Souter. There was nothing in the statute, the legislative history, or the record developed in preparation for trial of any such secondary effects. *See Glen Theatre*, 501 U.S. at 567-568, 582-585, 111 S.Ct. at 2461-2462, 2468-2470. Justice Souter simply analogized the type of entertainment at issue in *Glen Theatre* to that at issue in *Renton, American Mini Theatres*, and *LaRue*. Without the benefit of any studies to justify his conclusion, Justice Souter asserted that the "live nude dancing at issue here is likely to produce the same pernicious secondary effects as the adult films displaying 'specified anatomical areas' at issue in *Renton*." 501 U.S. at 584, 111 S.Ct. at 2469. It is clear that under either the plurality or the Souter concurrence in *Glen Theatre*, there is no constitutional requirement that the

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[9] "The law is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." *Glen Theatre*, 501 U.S. at 569, 111 S.Ct. at 2462 (*citing Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986)).

city make particularized findings regarding adverse secondary effects. As the court stated in *Cafe 207*:

> Evidence about secondary effects or, rather, the lack of them, is also clearly foreclosed. It is now established as a matter of law by Supreme Court jurisprudence culminating in [*Barnes v. Glen Theatre*], that secondary effects of proscribed conduct may be taken into consideration by a court evaluating the governmental interests justifying impingement upon free speech rights even when, as in *Barnes*, there is no legislative history demonstrating that the lawmakers actually considered secondary effects or any other specific factor (such as protecting order and morality) in enacting the challenged law.

Cafe 207, Inc. v. St. Johns County, 856 F.Supp. 641, 645 (M.D.Fla.1994), aff'd per curiam, 66 F.3d 272 (11th Cir.1995), *cert. denied*, --- U.S. ----, 116 S.Ct. 1544, 134 L.Ed.2d 647 (1996). In enacting these types of laws, lawmakers may thus rely upon the experience of other cities, studies done in other cities, caselaw reciting findings on the issue, as well as their own wisdom and common sense without the courts second guessing each statute's rational basis. As the court cited with approval in *Bellanca*: "Common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." 452 U.S. at 718, 101 S.Ct. at 2601. Based upon the foregoing, the court concludes that the city has satisfied the second part of the *O'Brien* test.[10]

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[10] Because of its legal holding that the city need not make particularized findings of adverse secondary effects, the defendant's

The third part of the test asks whether the governmental interest is unrelated to the suppression of expression. Sammy's itself is proof that the city's aim is not to suppress the erotic message conveyed there. Even if one assumes that some measure of nudity is important to the message conveyed in artistic dancing (an assumption necessary for plaintiff's contention that the ordinance violates the First Amendment), Sammy's dancers would now be more expressive than ever before.

The fourth part of the test asks whether the government's interest is furthered by the ordinance in the least restrictive way. There is no question that the ordinance's requirement that the plaintiffs either provide some modest cover on their dancer's breasts or cease to serve alcohol is certainly a minimal restriction necessary for the furtherance of the city's interest in controlling the admixture of alcohol and nudity. As indicated above, the regulation need not moderate the expression at all. Based on the above reasons, the court concludes that summary judgment on the First Amendment claim is due to be granted in favor of the city of Mobile.

B. OVERBREADTH

Both plaintiffs, but primarily The Candy Store, assert that the ordinance is overbroad and that it could be applied to First-Amendment protected activity engaged in by people or entities other than the instant plaintiffs. In this challenge, the Candy Store seeks to invoke the expanded standing rules that apply to overbreadth First Amendment challenges. In The Candy Store's motion for a preliminary injunction, this court declined to address the overbreadth issue for reasons of justiciability. This court found that while the plaintiffs may have standing to raise

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motion to strike the affidavit of Robert Bruce Mclaughlin (doc. 48) is MOOT.

an overbreadth challenge to the ordinance, the challenge brought in this action is not ripe for review. The city has repeatedly indicated that its current intention is to apply the ordinance only to institutions with on-premises liquor licenses that present topless or otherwise nude entertainment. The contention that the ordinance applies to other activities is pure speculation given the city's interpretation and announced enforcement intentions. *See e.g., Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 503, n. 21, 102 S.Ct. 1186, 1196, n. 21, 71 L.Ed.2d 362 (1982) ("The theoretical possibility that the village will enforce its ordinance against a paper clip next to Rolling Stone Magazine, [Flipside, *Hoffman Estate, Inc. v. Village of Hoffman Estates*] 639 F.2d 373, 382 (1981), is of no due process significance unless the possibility ripens into a prosecution"). *See also Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961). For the reasons cited above and in the court's order of March 26, 1996, the court concludes that the motion for summary judgment on the overbreadth claim is due to be granted in favor of the City of Mobile.

C. VAGUENESS

The Candy Store also asserts that the ordinance is void for vagueness. The ordinance has yet to be enforced against The Candy Store; hence, only a facial vagueness challenge is justiciable. *Diversified Numismatics, Inc. v. City of Orlando*, 949 F.2d 382, 387 (11th Cir.1991) ("Furthermore, because the Orlando ordinance has yet to be applied against the appellants, they must show that the ordinance 'is impermissibly vague in all of its applications' ") (citing *Village of Hoffman Estates*, 455 U.S. at 497, 102 S.Ct. at 1192).

As the court noted in its previous order, the ordinance clearly is not vague in all of its applications. There is no question that it prohibits topless female

dancing in a bar such as the one owned and operated by The Candy Store. In addition, topless female dancing falls squarely within the hard core of the ordinance's proscriptions. *See e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 608, 93 S.Ct. 2908, 2913, 37 L.Ed.2d 830 (1973) ("Even if the outermost boundaries of s 818 may be imprecise, any such uncertainty has little relevance here, where appellants' conduct falls squarely within the 'hard core' of the statute's prescriptions"). For the above reasons and for those cited in the court's order of March 26, 1996, summary judgment on the vagueness issue is due to be granted in favor of the City of Mobile.

D. EQUAL PROTECTION/ INVIDIOUS DISCRIMINATION

The Candy Store contends that the ordinance violates the equal protection clause in that the definition of nudity in the ordinance includes female, but not male, breasts. Such a claim, however, does not necessarily raise a classification impermissibly based upon gender. "The Constitution is violated when government, state or federal, invidiously classifies similarly situated people on the basis of the immutable characteristics with which they were born." *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 477- 478, 101 S.Ct. 1200, 1208-1209, 67 L.Ed.2d 437 (1981) (Stewart, J., concurring). Thus, "while detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes." *id.* It is apparent to the naked eye, and this court takes judicial notice, that female breasts are quite often different from male ones. In this regard, men and women are not "similarly situated," and the ordinance therefore raises no impermissible gender classification.

Assuming, however, that such a distinction is "gender-based" for equal protection purposes, the court finds that the distinction is substantially related to an important governmental interest. *See, e.g., U.S. v. Biocic*, 928 F.2d 112 (4th Cir.1991); *See also Craft v. Hodel*, 683 F.Supp. 289 (D.Mass.1988); *Tolbert v. City of Memphis*, 568 F.Supp. 1285 (W.D.Tenn.1983). For the above reasons, the court concludes that the motion for summary judgment on The Candy Store's equal protection claim is due to be granted in favor of the City of Mobile.

E. REMAINING CLAIMS

Sammy's has raised an equal protection argument in that topless bars are treated differently from other businesses. Without citing any authority, Sammy's contends that the ordinance violates a fundamental right and that the classification must be narrowly tailored to serve a compelling governmental interest. No such fundamental right is at issue, however, and the court finds that Sammy's challenge does not overcome rational basis equal protection review.

Sammy's has also raised procedural and substantive due process claims without citing any authority for same. As indicated previously, an individual representing Sammy's had notice of the hearing when the ordinance was passed, was present at same, heard testimony from those who supported and opposed the motion, and declined to speak on the advice of the ordinance's sponsor. Further, no statutory notice provisions were violated in enacting the ordinance, and Sammy's could cite no cases where the requirements of procedural due process would apply to this legislative enactment. For these reasons and for the reasons given in the March 6, 1996, order of this court, these claims are without merit.

Sammy's equitable estoppel claim is likewise without merit for the reasons given in the court's order of March 6, 1996.

The Candy Store's selective enforcement and res judicata claims are without merit for the reasons given in the court's order of March 26, 1996.

Both plaintiffs have raised Fifth Amendment takings claims without any attempt to show how their property has been "taken for public use." Regulations which deprive a property owner of only a portion of the economic value of his land do not rise to the level of a taking under the Fifth Amendment. *Lucas v. South Carolina*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). The plaintiffs have come forward with no evidence whatsoever to indicate that their property is no longer economically viable. This claim is likewise without merit.

For the foregoing reasons, the city's motion for summary judgment on all claims raised by the plaintiffs is due to be and hereby is GRANTED.

J & B SOCIAL CLUB, # 1, INC. d/b/a The Candy Store and Jennifer Q. Bodiford,

Plaintiffs,

v.

The CITY OF MOBILE, et al., Defendants.

Civil Action No. 96-0246-BH-S.

920 F.Supp. 1241 (S.D. Ala. 1996)

United States District Court,

S.D. Alabama,

Southern Division.

March 26, 1996.

ORDER

HAND, Senior District Judge.

The plaintiffs J & B Social Club, Inc., d/b/a The Candy Store (hereinafter "The Candy Store") and its owner Jennifer Bodiford bring this cause of action for injunctive relief and monetary damages against the City of Mobile and its city council members, public safety director, chief of police, and mayor. The action is currently before the court on plaintiffs' motion[1] for a preliminary injunction, enjoining the city from enforcing a recently enacted city ordinance (1996 Ordinance 03-003) which, at its core, bans topless dancing in bars. The

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[1] Tab 2.

action is also before the court on defendants' motions[2] to dismiss all individually named defendants, in both their individual and official capacities, except the City of Mobile.[3] This court has original subject matter jurisdiction over the claim pursuant to 28 U.S.C. s 1331.

The matter came on for hearing on the motions on March 19 and 20, 1996. At the hearing, plaintiffs requested, and both parties were granted, until Friday, March 22, 1996, to provide the court with supplemental legal memoranda. It is now ripe for review.

I. PROCEDURAL BACKGROUND AND CLAIMS

This action comes on the heels of another challenge to the constitutionality of the same ordinance, *Sammy's of Mobile, LTD. v. City of Mobile*, 96-0176-BH-M, and makes several of the same arguments as those asserted in the *Sammy's* case. In *Sammy's*, the plaintiffs raised a number of first amendment claims,[4] and also challenged the ordinance on grounds of vagueness, taking without just compensation in violation of the Fifth Amendment, and violation of substantive and procedural due process. The court will confine its review in the present case to issues which were not adjudicated in *Sammy's*.

This case presents a pre-enforcement challenge[5] to the validity of Ordinance 03-003. The theories raised by

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2 Tabs 6 and 8.

3 Plaintiffs also made an oral motion to dismiss the city council members with leave to amend the complaint to add them at a later time.

4 The plaintiffs in *Sammy's* raised the first amendment issue of overbreadth in the complaint, but did not argue overbreadth in the motion for a temporary restraining order. Consequently, the court did not specifically address overbreadth in denying that motion.

5 The city has directed its police force to withhold enforcement of the ordinance until its constitutionality can be

the plaintiffs attack the ordinance on both facial and applied grounds. First, plaintiffs argue that the ordinance is res judicata as to them and therefore unenforceable against The Candy Store. Second, plaintiffs allege that the city plans to selectively enforce the ordinance only against bars with female topless dancers in violation of the Equal Protection Clause of the Fourteenth Amendment. Third, plaintiffs argue that the ordinance invidiously discriminates against women in that it defines nudity as encompassing female and not male breasts, again in violation of the Equal Protection Clause. Fourth, the plaintiffs argue that the ordinance is void for vagueness.[6] Finally, the plaintiffs argue that the ordinance is overbroad.

To be entitled to a preliminary injunction, a movant must show: "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction were not granted; (3) that the threatened injury outweighs the harm an injunction may cause the defendant; and (4) that granting the injunction would not disserve the public interest." *Levi Strauss & Co. v. Sunrise International Trading Inc.*, 51 F.3d 982, 985 (11th Cir.1995). "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175 (1981).

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ascertained by the courts. While there has been no actual enforcement of the ordinance, the record does reflect that, in response to a 911 call, Mobile police entered Sammy's topless bar for observation. There is no evidence that any such visits were made to the plaintiffs' establishment. To date, no arrests have been made for violation of the ordinance.

[6] This court only addressed the vagueness issue in summary fashion in the *Sammy's* case, because the plaintiffs there made no attempt to demonstrate how the ordinance was vague or even how they had standing to challenge its vagueness.

Upon review of the pleadings, the plaintiffs' briefs in support of the motion, the defendants' brief in opposition, and the evidence in the record and the oral arguments by counsel, the court finds that the plaintiffs have not demonstrated a substantial likelihood of success on the merits of their respective claims. For the reasons assigned below, the motion for a preliminary injunction in favor of the plaintiffs and against the City of Mobile is due to be and hereby is DENIED.[7]

II. DISCUSSION

While the plaintiffs' arguments are primarily directed at the constitutionality of the ordinance, the court will begin with a statutory construction argument that has nothing to do with plaintiffs' constitutional arguments per se, because, if taken at face value, the court would be obliged to dismiss this case.

At oral argument and in his post-trial brief, plaintiffs strenuously argue that the ordinance as written does not regulate female topless dancing in establishments with on-premise liquor licenses.[8] [FN8] Indeed, the plaintiffs argue that the ordinance does not forbid any actual nudity or sexual conduct in bars at all. Plaintiffs rest this argument on the prohibiting language in paragraph B of the ordinance, which proscribes, "any motion picture, show, performance, or other presentation upon the licensed premises, which, in whole or in part, depicts nudity or sexual conduct or any simulation thereof" (emphasis added). The verb "depicts," according to the plaintiffs, means that the ordinance bans only the depiction of nudity, not actual nudity, despite the fact that

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[7] It is important to note that this action is not before the court for final adjudication of the claim, but merely on a motion for a preliminary injunction. The decision of the court today does not determine or even impact upon the ultimate disposition of the case.

[8] *See, e.g.*, Plaintiffs' Post-Trial Memoranda Brief, at p. 10.

the ordinance on its face addresses "the disturbances associated with mixing alcohol and nude dancing." In other words, a performance consisting of naked dancing pictures would be illegal, but not one consisting of actual nude or topless dancers. The court declines to place this nonsensical construction on the ordinance,[9] and will address the plaintiffs' remaining claims.

A. Res Judicata

Sometime in 1991, the City of Mobile filed an action against The Candy Store seeking monetary damages and specific performance of a contract in which The Candy Store agreed not to offer topless dancing at its establishment. The Candy Store denied that it had violated a valid contract with the city and filed a counterclaim seeking $2,000,000 in damages for violation of their constitutional rights. Both the original suit and the counterclaim were dismissed upon the parties' settlement of their claims.

Plaintiffs now urge that the enforcement of the ordinance is barred by the doctrine of res judicata. This, of course, would render the rest of the plaintiffs' claims moot and, incidently, might also effectively grant the plaintiffs a monopoly over the topless bar business in Mobile.

"Res judicata, or claim preclusion, bars relitigation of matters that were litigated or could have been litigated in an earlier suit." *Manning v. City of Auburn*, 953 F.2d 1355 (11th Cir.1992). Plaintiffs, without being able to cite any legal authority, ask this court to extend the doctrine of res judicata beyond the judicial relitigation of a legal

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[9] If the court were to construe the ordinance as narrowly as the plaintiffs urge, their action for injunctive relief and $2,000,000 in damages against the city would be non-justiciable on both standing and ripeness grounds.

claim to bar the passage and enforcement of a legislative initiative. What is more, the legislative initiative of which the plaintiffs seek to bar enforcement was neither at issue or even in existence during the earlier litigation. Plaintiffs do not have a substantial likelihood of succeeding on the merits of this claim.

B. Selective Enforcement

Plaintiffs claim that the city intends to enforce the ordinance in a discriminatory and unequal manner by singling out topless bars for prosecution. Plaintiffs argue that the ordinance on its face applies to the activities of numerous other establishments. The city responds that the ordinance is not as broad as the plaintiffs believe and therefore declines to enforce it as such.

To prevail on a selective prosecution claim, the plaintiffs must show that they have been "singled out for prosecution while others similarly situated and committing the same acts have not been prosecuted." *Fillingim v. Boone*, 835 F.2d 1389, 1399 (11th Cir.1988). Plaintiffs must also show that the government prosecuted them invidiously or in bad faith. *id.*, at p. 1399. "The invidiousness requirement is satisfied only if it can be established that the government's selective prosecution is motivated by constitutionally impermissible motives such as racial or religious discrimination or interference with the legitimate exercise of constitutional rights." *Lanier v. City of Newton*, 842 F.2d 253 (11th Cir.1988).

In the present case, plaintiffs present a pre-enforcement challenge. Other than a police visit to a different topless bar, the city has not yet attempted to enforce this ordinance. Plaintiffs' only damages, if any, result from the passage of the ordinance and its expected enforcement. To the extent plaintiffs may have suffered these damages, there is no causal connection between

such damages and their claim of selective enforcement. Plaintiffs' selective enforcement claim is therefore not yet ripe for adjudication.[10] *See, e.g., Diversified Numismatics, Inc. v. City of Orlando*, Fl., 949 F.2d 382, at 388-390 (11th Cir.1991).

C. Invidious Discrimination

As evidence for their selective enforcement claim, plaintiffs contend that the city has stated that it does not intend to enforce the ordinance against bars that allow male topless dancing. Since the ordinance does not say anything about male topless dancing in bars, the failure to enforce it against this activity has nothing to do with a selective enforcement claim under the Fourteenth Amendment. Rather, the plaintiffs' claim here, as set out only in their oral argument and post-trial brief, is one of invidious gender discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

Plaintiffs have not adequately raised this claim in their complaint or in their motion for a preliminary injunction. The only portion of their complaint which might be said to relate in any manner to gender discrimination is in Section IId, wherein the plaintiffs list a number of hypothetical questions. Among these questions is the following: "On what rational basis may the ordinance discriminate between the male and female breast?"[11] This is the only question in the series which

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[10] Plaintiffs have another problem with their selective enforcement claim. The court can dismiss an indictment on a selective prosecution claim, but it cannot invalidate the statute itself. Even if the court could reach this claim and plaintiffs were found to be likely to succeed on the merits, the court could not grant the plaintiffs the remedy they seek, non-enforcement. The court could only require the city to enforce the ordinance equally against all others similarly situated to the plaintiffs. *See e.g., Geaneas v. Willets*, 911 F.2d 579, at 587 (11th Cir.1990).

[11] See Complaint, P 16(g), p. 10.

mentions discrimination at all, and it is raised not in the context of a gender discrimination claim but in support of plaintiffs' arguments on vagueness and overbreadth. Moreover, "rational basis" is not the relevant test for gender discrimination under the Equal Protection Clause. If the plaintiffs wish the court to rule on this issue, they must ask for leave of court to amend their complaint. *See generally* Fed.R.Civ.P. 15.

D. Vagueness and Overbreadth

In contrast to their gender discrimination claim, plaintiffs raise specific claims of vagueness and overbreadth in their complaint and in their motion for a preliminary injunction. Plaintiffs' challenge here is primarily a facial one; they state that, "The Ordinance does not contain any severability or savings clause, and consequently Plaintiffs contend that the Ordinance must stand or fall in its entirety." *See* Complaint (tab 1), P 18 and Motion for a Preliminary Injunction (tab 2), P 17.

Vagueness and overbreadth are separate claims. Strictly speaking, a vagueness claim arises under the due process clause of the Fourteenth Amendment. The vagueness doctrine, "incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.' " *Smith v. Goguen*, 415 U.S. 566, 571, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974). On the other hand, a statute is overbroad when, though it is designed to regulate or prohibit activities which are not constitutionally protected, it also includes within its scope activities which are protected by the First Amendment. When first amendment rights are involved, as they are here, the claims of vagueness and overbreadth necessarily overlap, though the claims are still distinct. The court will therefore treat these two claims separately.

i. Vagueness

"Words inevitably contain germs of uncertainty." *Broadrick v. Oklahoma*, 413 U.S. 601, 608, 93 S.Ct. 2908, 2913, 37 L.Ed.2d 830 (1973). In analyzing a vagueness claim, the Court has indicated that, "there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *id.*, at p. 608, 93 S.Ct. at p. 2914, (explaining that s 818 of the Hatch Act was not unconstitutionally vague) (emphasis added).

"A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to others." *Village of Hoffman Estates, et al., v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102, S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982). As applied to them, plaintiffs' claim of vagueness[12] is not ripe because the statute has yet to be enforced against them. Because plaintiffs have raised their challenge prior to enforcement, only a facial challenge is justiciable.[13] *See Diversified Numismatics, Inc. v. City of Orlando, Fl.*, 949 F.2d 382, 387 (11th Cir.1991) ("Furthermore, because the Orlando ordinance has yet to be applied against the appellants, they must show that the ordinance 'is impermissibly vague in all of its applications' ") (*citing Village of Hoffman Estates*, 455 U.S. at 497, 102 S.Ct. at 1192).

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[12] Among the terms in the ordinance the plaintiffs claim to be unconstitutionally vague are the following: "opaque covering," "pubic area," and "buttocks."

[13] Plaintiffs have no way of predicting which aspects of the ordinance may be applied against them or not. Therefore, they must argue that the ordinance is vague in every respect.

As for the plaintiffs' claim of facial vagueness, the ordinance clearly is not vague in all of its applications. There is no question that it prohibits topless female dancing in a bar such as the one owned and operated by the plaintiffs. Moreover, topless female dancing, an activity offered by the plaintiffs, falls squarely within the hard core of the ordinance's proscriptions. *See e.g., Broadrick*, 413 U.S. at 608, 93 S.Ct. at 2913-14. The plaintiffs are not substantially likely to succeed on the merits of their vagueness claims.

ii. Overbreadth

Plaintiffs' main contention is that the ordinance is overbroad; that is, it criminalizes some activity protected by the First Amendment in an unconstitutional manner.[14] Specifically, plaintiffs claim that the ordinance criminalizes the presentation of magazines or posters with topless women or otherwise nude persons in both on-premise and off-premise liquor licensees. Plaintiffs have entered a number of such magazines and posters into the record of this case, ranging from completely nude pornography to pictures of artwork in Harper's Bazaar.

Unlike a vagueness challenge, the Supreme Court has recognized an exception to the traditional standing requirements of parties raising overbreadth challenges, due to the chilling effect on free speech an overbroad statute may have. Broadrick, 413 U.S. at 610-613, 93 S.Ct. at 2915-16. The court has characterized this departure from the standing requirement as "strong medicine," which is to be applied "sparingly" by the Court

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[14] This court has already stated that, "the Mobile ordinance falls within a long line of cases upholding the states' authority to prohibit nude dancing in clubs licensed to sell alcohol." *Sammy's of Mobile, Ltd. v. City of Mobile*, 96-0176, Order of March 6, 1996, at p. 7. Therefore, the court will not address the plaintiffs' first amendment overbreadth argument to the extent that it involves topless dancing.

and not when "a limiting construction has been or could be placed on the challenged statute." Broadrick, 413 U.S. at 613, 93 S.Ct. at 2916. Plaintiffs therefore have standing to challenge the overbreadth of the ordinance on the grounds that it may criminalize, for example, the sale of Harper's Bazaar or Sport's Illustrated in a typical grocery store licensed to sell beer or wine.

Although this court is prepared to construe the ordinance in a manner which does not implicate first amendment rights,[15] it declines to do so here, again for reasons of justiciability. The plaintiffs have standing to raise their overbreadth claim, but such overbreadth claim is still not ripe.[16] *See Village of Hoffman Estates*, 455 U.S. at 503, n. 21, 102 S.Ct. at 1196, n. 21 ("The theoretical possibility that the village will enforce its ordinance against a paper clip next to Rolling Stone Magazine, 639 F.2d, at 382, is of no due process significance unless the possibility ripens into a prosecution"). *See also Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961). There is simply no current threat of enforcement of this ordinance against either those licensed only for sale of alcoholic beverages for off-premises consumption or against those establishments licensed for on- premises consumption and who sell or present nude magazines or posters. The city has repeatedly stated that it currently intends to enforce the ordinance against bars that engage in topless dancing, nothing more. Plaintiffs may not force an adjudication of a constitutional question on the highly speculative possibility that the city might prosecute

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[15] It does not take a rocket scientist to interpret this ordinance, and any reasonably intelligent person applying common sense would not read it as broadly as urged by the plaintiffs.

[16] No state court has had the opportunity to construe the meaning of the ordinance at issue here. In addition to the justiciability argument, the court is also mindful of the principle of comity, which mitigates against a federal court construing a state statute before the state courts have had the opportunity to do so.

grocery stores for selling magazines containing nude art or skimpy swimsuits. Such a ruling would amount to an advisory opinion in violation of Article III. Because the court declines to reach this issue, it finds that the plaintiffs have not demonstrated a substantial likelihood of success on the merits.

III. CONCLUSION

For the foregoing reasons, the plaintiffs' motion for a preliminary injunction is DENIED.

Additionally, at oral argument, counsel for the plaintiffs indicated that he was not sure whether plaintiff had a right of recovery against any of the individually named defendants, other than the City of Mobile. The defendants' motions to dismiss all the named plaintiffs except the city are GRANTED. Plaintiffs may file for leave of court to amend the complaint to add some or all of the defendants if it can show how recovery against them would be possible given the 11th Circuit's interpretation of the law on qualified immunity.

SO ORDERED.

SAMMY'S OF MOBILE, LTD., and Sammy's Management Company, Inc., Plaintiffs,

v.

CITY OF MOBILE, Defendant.

Civil Action No. 96-0176-BH-M.

928 F.Supp. 1116 (S.D. Ala. 1996)

United States District Court,

S.D. Alabama,

Southern Division.

March 6, 1996.

ORDER

HAND, Senior District Judge.

This action is before the court on plaintiffs' motion for a temporary restraining order (TRO)[1] against the city of Mobile enjoining it from enforcing a recently enacted ordinance banning, among other things, topless dancing in establishments licensed to sell alcoholic beverages. The plaintiffs own and manage Sammy's, an ABC licensee which offers its patrons a combination of adult beverages and bare-breasted female dancing as entertainment.

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[1] The parties have extensively briefed the issues raised by this TRO motion, they have presented arguments and evidence to the court at a hearing, and the city has voluntarily withheld enforcement of the ordinance pending this order. Consequently, the TRO motion has the effect of a motion for a preliminary injunction. *See Haitian Refugee Center, Inc. v. Baker*, 950 F.2d 685 (11th Cir.1991).

The plaintiffs filed a complaint and a motion for a temporary restraining order in the Circuit Court of Mobile County on February 22, 1996. Before the Circuit Court had an opportunity to rule on the TRO motion, the action was removed to this court on February 26, 1996 pursuant to 28 U.S.C. s 1441. Since the case arises under a number of federal constitutional issues, this court has original subject matter jurisdiction over the claim pursuant to 28 U.S.C. s 1331.

The action came on for hearing on February 29, 1996. At the hearing, both parties requested additional time to provide the court with supplemental briefs on specified legal issues.[2] The court granted the parties until Tuesday, March 5, 1996 to file additional legal argument. By previous arrangement of the parties, the defendant agreed to forego enforcement of the ordinance until this court could make a ruling upon the issues raised by the TRO motion.

"To be entitled to a TRO, a movant must show: (1) a substantial likelihood of ultimate success on the merits; (2) the TRO is necessary to prevent irreparable injury; (3) the threatened injury outweighs the harm the TRO would inflict on the non-movant; and (4) the TRO would serve the public interest." *Ingram v. Ault*, 50 F.3d 898 (11th Cir.1995).[3] The purpose of a TRO is to maintain the status quo between the parties and to prevent irreparable harm pending a trial on the merits of the case; it is not a decision on the ultimate disposition of the law suit. *McArthur v. Firestone*, 817 F.2d 1548 (11th Cir.1987). The decision to grant a TRO is within the

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[2] Defendant originally objected to the granting of additional time for plaintiff to further brief the due process issue; however, counsel for the defendant removed his objection upon learning of the court's desire to see further briefing on the takings issue.

[3] Virtually the same standards apply to preliminary injunctions.

broad discretion of the trial judge. *Majd-Pour v. Georgiana Community Hospital, Inc.*, 724 F.2d 901 (11th Cir.1984).

In support of his TRO motion, plaintiff raises several constitutional challenges to the ordinance: violation of freedom of speech under the First Amendment; vagueness; taking property without just compensation in violation of the Fifth Amendment; and violation of substantive and procedural due process under the 14th Amendment. The plaintiff also claims legal reliance upon the city's previous granting of its liquor license under the doctrine of equitable estoppel. The court will begin with an analysis of the plaintiff's First Amendment claims.

A. FREEDOM OF SPEECH

The First Amendment to the U.S. Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[4]

Although the free speech clause of the amendment makes no mention of protecting conduct from

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[4] The First Amendment has been applied to the States by action of the Fourteenth Amendment, despite evidence that the ratifiers of the Fourteenth Amendment did not intend for the First Amendment to be so applied. *See McClellan, J., Christianity and the Common Law, in Joseph Story and the American Constitution*, at p. 154 ("A conclusive argument against the incorporation theory, as least as respects the religious provisions of the First Amendment, is the 'Blaine Amendment' proposed in 1875)."

congressional regulation, the Supreme Court has held on numerous occasions that, "[W]here the government prohibits conduct precisely because of its communicative attributes, we hold the regulation unconstitutional." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 577, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Scalia, J., concurring).

The Supreme Court recently held that barroom nude dancing is protected by the first amendment, even though the statute at issue was a general prohibition of nudity in public places and not directed against nude dancing per se.[5] *Glen Theatre*, Inc., *id.* at p. 565-566, 111

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[5] It is doubtful that the Framers of our Constitution ever would have considered dancing in the nude at the local bar to be "speech" entitled to First Amendment protection. The language of the amendment is clear; it prohibits infringement upon "freedom of speech " (emphasis added). On its face, the free speech clause of the First Amendment does not reach conduct.

The judge-made distinction between conduct which involves enough of a communicative element to be protected by the First Amendment and that which does not is not always readily ascertainable, if ever. The result often is an unwarranted micro-management of the law of expression.

The raising of an eyebrow is an action that communicates an idea. The aroma of good food conveys a message also and can even invite a powerful human response. Indeed, all voluntary action can imply some sort of an idea, even if it is only the view that such action is appropriate to the circumstances. But to call all voluntary activity "expressive" for First Amendment purposes would reduce the concept of expression to the point of being meaningless. *Barnes* v. *Glen Theatre*, Inc., 501 U.S. at 581, 111 S.Ct. at 2468 (Souter, J., concurring). How is a judge to decide when First Amendment protection attaches?

In the context of nude dancing, it has been suggested that when dancing is done as a performance and where the dancer is nude or nearly so, a feeling of eroticism and an endorsement of erotic experience is expressed. The combination of nudity with the expressive activity of performance dance serves to enhance the force

S.Ct. at p. 2459-2460. In so holding, the Supreme Court relied upon several earlier cases which had suggested that certain types of naked dancing contain enough of a communicative element to be protected to some extent by the First Amendment. In *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648 (1975), the court characterized customary nude barroom dancing as potentially having the "barest minimum" of First Amendment protection in some circumstances. (Citing *California v. LaRue*, 409 U.S. 109, 118, 93 S.Ct. 390, 397, 34 L.Ed.2d 342 (1972)). *See also Schad v. Mount Ephraim*, 452 U.S. 61, 66, 101 S.Ct. 2176, 2181, 68 L.Ed.2d 671 (1981) (stating that, "as the state courts in

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of the activity's expressive nature. *id.*, at 581, 111 S.Ct. at 2468 (Souter, J., concurring).

Other forms of dancing may express some sort of feeling or meaning other than eroticism. Does this entitle them to First Amendment protection? If not, why not? See e.g., Dallas v. Stanglin, 490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989) (recreational dance not entitled to First Amendment protection).

Is there anything in the First Amendment that entitles eroticism conveyed by nude dancing to more protection than any other message or idea conveyed by different human conduct? When judges make these distinctions, they inevitably make some judgment upon the content of the conduct's message.

If it is not the content, but the force of the message that we view as important, would the result in Dallas have been different if the dancing participants there were allowed to dance naked? Surely the message conveyed by recreational dancing takes on added force and even added meaning when the parties do so in the nude.

Without clear cut distinctions between laws which seek to regulate conduct and laws which seek to regulate speech, the courts will continue to be asked to micro manage the law of expression in ways they are ill-equipped to do. Constitutional amendment, not judicial rewriting is the remedy designed by our Framers for those not satisfied by straightforward interpretation of the Constitution.

this case recognized, nude dancing is not without its First Amendment protections from official regulation.") (citations omitted). The court in *Glen Theatre* was careful to limit the scope of its holding, stating that, "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." *Glen Theatre, Inc.*, 501 U.S. at 566, 111 S.Ct. at 2460.[6]

A determination that the First Amendment applies to the topless dancing at issue in this case is only the first prong of the court's inquiry. The second prong entails what level of protection is to be afforded the expressive conduct at issue.[7]

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[6] According to the Supreme Court, not all dancing is entitled to protection. The Supreme Court has held that recreational soul and "funk" music dancing is not protected by the First Amendment. *Dallas v. Stanglin*, 490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989). Aerobic dancing likewise appears to have no first amendment protection. *Barnes* v. *Glen Theatre*, Inc., 501 U.S. 560, 581, 111 S.Ct. 2456, 2468, 115 L.Ed.2d 504 (Souter, J., concurring). Additionally, nude dancing that constitutes obscenity would not be entitled to first amendment protection.

[7] Despite the plain wording of the First Amendment, the courts have created multiple tiers of scrutiny to apply to regulations affecting freedom of speech. Under the court's jurisprudence, a judge is required to determine the relative importance of the government's interest in a regulation affecting speech (or expressive conduct) and to determine whether such regulation is the least restrictive possible to advance or protect the governmental interest. Thus the courts must balance the parties' competing interests in order to determine which side will prevail. In many cases, even when the court believes a First Amendment interest is at stake, the courts have held that the regulation is valid because of the relative importance of the government's interest in the regulation. This sort of balancing is not only unfaithful to the plain words of the First Amendment, it invites and necessitates judicial policy making that is not a valid exercise of the Article III power.

In *LaRue*, the Supreme Court concluded that, "the broad powers of the States to regulate the sale of liquor, conferred by the Twenty- first Amendment, outweighed any First Amendment interests in nude dancing and that a State could therefore ban such dancing as part of the liquor license control program." *Doran*, 422 U.S. at 932-933, 95 S.Ct. at 2567-2569. "Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty- first Amendment."[8] *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718, 101 S.Ct. 2599, 2602, 69 L.Ed.2d 357, 361 (1981).

The State of Alabama has delegated its police powers recognized by the Twenty-first Amendment to its localities. *See Lanier v. City of Newton*, 842 F.2d 253 (11th Cir.1988) (see appendix, answer to certified question). As result, the Mobile ordinance falls within the long line of cases upholding the states' authority to prohibit nude dancing in clubs licensed to sell alcohol. *See Bellanca; City of Newport, Kentucky v. Iacobucci*, 479 U.S. 1047, 107 S.Ct. 913, 93 L.Ed.2d 862; *Lanier, Fillingim v. Boone*, 835 F.2d 1389 (11th Cir.1988); *Grand Faloon Tavern, Inc., v. Wicker*, 670 F.2d 943 (11th Cir.1982). Consistent with this authority, Mobile's interest in regulating nudity in places where alcohol is served

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[8] Upon passage of the federal Constitution, the States retained their general police power over health, safety, welfare, and morals. *See e.g., The Federalist, # 45*. The application of the police power may be limited or prohibited by various provisions of the Constitution, but the police power itself remains with the States. The Twenty-first Amendment does not confer upon the States alcohol-regulating authority per se; it merely makes clear that other sections of the Constitution, e.g., the Commerce Clause, do not serve to limit the States' legitimate exercise of their own police power in the manner they ordinarily might if the Twenty-first Amendment did not exist.

outweighs whatever First Amendment interest that applies to nude dancing.[9]

B. LEGISLATIVE FINDINGS

Plaintiffs strenuously argue that the ordinance is unconstitutional because the factual basis for the preamble[10] has been questioned. Plaintiffs further argue that the city hasn't met its burden of making sufficient legislative findings which demonstrate the ill effects that

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9 Plaintiffs assert that the four-part test developed in *U.S. v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) is applicable to the ordinance in this case. *O'Brien* held that expressive conduct can be validly regulated if (1) the regulation is a legitimate exercise of authority, (2) it furthers an important or substantial governmental interest, (3) the governmental interest is unrelated to the suppression of free speech, and (4) the restriction of first amendment rights is no greater than necessary to further the government's interest. However, *O'Brien* does not apply because the ordinance here was passed pursuant to Mobile's authority to regulate the sale of alcoholic beverages pursuant to the Twenty-first Amendment. *See California v. LaRue*, 409 U.S. at 116, 93 S.Ct. at 396.

10 The preamble to the Ordinance states:

WHEREAS, the City Council of the City of Mobile, Alabama, finds and declares that nudity and sexual conduct and depiction thereof, coupled with alcohol in public places, encourages undesirable behavior and is not in the interest of the public health, safety, and welfare.

WHEREAS, the Council has chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell spirituous or vinous liquors or malt or brewed beverages.

NOW THEREFORE, the Council adopts this Ordinance pursuant to the powers under the Twenty-first Amendment to the Constitution of the United States delegated to it by the State of Alabama.

accompany the commingling of nudity and alcohol in establishments licensed to sell liquor. Plaintiffs urge the court to apply the judicial scrutiny applied in *Grand Faloon* and *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir.1985). However, those cases involved ordinances enacted pursuant to the municipality's police power; the broader police power of the State involving alcohol regulation recognized and protected by the Twenty-first Amendment was not at issue. The Supreme Court in *Bellanca* held that "even if explicit legislative findings were required to uphold the constitutionality of this statute as it applied to topless dancing," the legislative purposes set out in a memorandum accompanying the statute were sufficient. Bellanca, 452 U.S. at 717-718, 101 S.Ct. at 2601-2602. In *Lanier*, the court noted:

> Because the ordinance in this case was adopted pursuant to authority derived from the twenty-first Amendment, rather than from the municipality's police power, "extensive and detailed legislative findings based upon substantial evidence that the prohibited activity contributed to criminal activity in the county are not required."

Lanier, 842 F.2d at 255 (citing Fillingim, 835 F.2d at 1397). If legislative findings are at all necessary when states or municipalities act pursuant to the Twenty-first Amendment, the requirement is minimal and easily met by the city's findings set forth in the preamble to the ordinance. The plaintiffs arguments in this regard are without merit.

C. DUE PROCESS

Plaintiffs next assert that the City Council's manner of enacting the ordinance deprived them of

procedural due process.[11] [FN11] Specifically, plaintiffs contend that they were denied notice of the meeting where the ordinance was adopted and an opportunity to be heard. Plaintiffs make no contention that the manner in which the City Council passed the ordinance in question violated any statutory notice requirements.

The Fourteenth Amendment provides that no State shall deprive a person of life, liberty, or property without due process of law. Procedural due process refers to the requirement that an individual be given notice and an opportunity to be heard before any judicial, executive, or administrative action deprives him of a liberty or property interest. Procedural due process typically does not apply to legislative action because it is assumed that the "process" which is "due" is merely the employment of the procedures necessary to validly pass the law in question. For example, Congress may not pass a bill without a majority vote in both houses. There is no constitutional requirement that Congress or state legislatures provide notice and an opportunity to be heard to individuals whose liberty or property is affected by legislative action. If the people are unhappy with the manner in which Congress enacts legislation, their remedy is with the ballot box, not the courthouse.

There is no question that the City Council exercised legislative authority in passing the ordinance. The Alabama Supreme Court has made clear that Alabama has delegated its police powers pursuant to the Twenty-first Amendment to its municipalities. *See Lanier v. City of Newton*, 518 So.2d 40 (Ala.1987). The ordinance itself states that the City is exercising such power. The ordinance has the effect of any general law; it

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[11] Plaintiffs also contend that the ordinance violates their substantive due process rights. This claim has no merit.

is not subject to the requirements of procedural due process.[12] *Cf. Crymes v. DeKalb County, Ga.*, 923 F.2d 1482, 1485 (11th Cir.1991) ("It is clear that if the Commissioners were performing a legislative function in voting to deny *Crymes* a development permit, they would be entitled to absolute immunity from suit").

D. REMAINING CLAIMS

Plaintiffs equal protection claim raises no suspect classification. Because the ordinance was passed pursuant to the state's legitimate police powers recognized by the Twenty-first Amendment and delegated to the municipalities, this claim is additionally unlikely to succeed on the merits.

Plaintiffs argue that the ordinance is unconstitutionally vague, but have made no attempt, other than conclusory statements, to demonstrate how the ordinance is vague. Upon reviewing the plaintiffs' arguments and the ordinance itself, the court concludes that the plaintiffs have not demonstrated any likelihood of success on the merits of this claim.

Regarding plaintiffs' equitable estoppel claim, the Alabama Supreme Court has held that the legislature has the right under the State Constitution to change the laws regulating intoxicating liquors at any time. *Ebony Club, Inc. v. State of Alabama*, 318 So.2d 282 (1975). The court

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[12] Even if the ordinance were subject to attack on procedural due process grounds, the court does not believe that the plaintiffs would be likely to prevail on the merits of the issue of how much process is due. The plaintiffs not only had notice of the hearing where the ordinance was passed, but were actually present, heard testimony from individuals who opposed its passage, and declined to speak personally against the measure apparently on the advice of the ordinance's sponsor. Clearly, at least some notice and opportunity to be heard was given by the City Council.

concludes that the plaintiffs have not demonstrated a likelihood of success on the merits of this claim.

Finally, plaintiffs appear to have waived their fifth amendment takings claim. *See* Plaintiffs' Supplemental Memorandum of Law in Support of the Issuance of a Temporary Restraining Order or Preliminary Injunction, at p. 5 ("Plaintiffs' concede that because, under Alabama law, there is no property interest in an alcoholic beverage permit, there can be no just compensation claim"). Even without this waiver, the court does not believe that the plaintiffs have met their burden of showing a likelihood of prevailing on the merits of this claim.

Plaintiffs have made an initial showing that their business will suffer no small amount of economic harm if the ordinance is enforced. However, the Supreme Court has made clear that regulations which deprive a property owner of only a portion of the economic value of his land do not rise to the level of a "taking" under the Fifth Amendment. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). The plaintiffs have not demonstrated that their property will be rendered worthless by the ordinance. Further, the plaintiffs claim of irreparable injury with regard to this claim is likewise suspect since the recovery allowed for a "taking" is "just compensation," for which there is an adequate remedy at law.

For the foregoing reasons, the plaintiffs' motion for a temporary restraining order or preliminary injunction is hereby DENIED.

SO ORDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-7073

SAMMY'S OF MOBILE, LTD., AN ALABAMA LIMITED PARTNERSHIP; SAMMY'S MANAGEMENT COMPANY, INC., AN ALABAMA CORPORATION,

Plaintiffs-Appellants,

versus

CITY OF MOBILE, A BODY CORPORATE AND POLITIC,

Defendant-Appellee.

J & B SOCIAL CLUB, # 1, INC., D.B.A. THE CANDY STORE, JENNIFER Q. BODIFORD: SAMMY'S OF MOBILE, LTD. AN ALABAMA LIMITED PARTNERSHIP,

Plaintiffs-Appellants,

versus

CITY OF MOBILE, ALA.,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Alabama

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ___F.2d ___)

Before: BIRCH, Circuit Judge, and HILL and KRAVITCH, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
SENIOR UNITED STATES CIRCUIT JUDGE

Filed August 5th, 1998

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

November 4, 1998

Mr. Luke Charles Lirot
112 East Street
Suite B
Tampa, FL 33602

Re: Sammy's of Mobile, Ltd. et al.
v. City of Mobile, Alabama
Application No. A-377

Dear Mr. Lirot:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on November 4, 1998, extended the time to and including December 18, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, CLERK
By

/s/ Sandra Elliott Spagnolo
Sandra Elliott Spagnolo
Assistant Clerk

03 – 003 1996

AN ORDINANCE PROHIBITING NUDITY AND SEXUAL CONDUCT IN ESTABLISHMENTS LICENSED TO SELL ALCOHOLIC BEVERAGES

Sponsored by: Reggie Copeland

WHEREAS, the City Council of the City of Mobile, Alabama, finds and declares that nudity and sexual conduct and depiction thereof, coupled with alcohol in public places, encourages undesirable behavior and is not in the interest of the public health, safety, and welfare.

WHEREAS, the Council has chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell spirituous or vinous liquors or malt or brewed beverages.

NOW, THEREFORE, the Council adopts this Ordinance pursuant to the powers under the Twenty-first Amendment to the Constitution of the United States delegated to it by the State of Alabama.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MOBILE, ALABAMA, as follows:

A. The following words and terms when used in this ordinance, shall, for the purpose of this ordinance have the meanings respectively ascribed to them by this section.

1. "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque

covering of any portion thereof below the top of the darkened area surrounding the nipple, or the depiction of covered male genitals in a discernibly turgid state.

2. "Sexual Conduct" means the performance of acts, or simulated acts, of masturbation, homosexuality, sodomy, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or if such person be a female, her breast.

3. "Knowingly" means having actual or constructive knowledge of the character and content of the subject matter. A person has constructive knowledge if a reasonable inspection under the circumstances would disclose the nature of the subject matter and the failure to inspect for the purpose of avoiding such disclosure.

B. It shall be unlawful for any manager, officer, agent, servant, employee or person in charge of any establishment within the City of Mobile or the police jurisdiction thereof, licensed to sell spirituous or vinous liquors or malt or brewed beverages under the laws of the State of Alabama, knowingly to exhibit, suffer, allow, permit, engage in, participate in, or be connected with, any motion picture, show, performance, or other presentation upon the licensed premises, which, in whole or in part, depicts nudity or sexual conduct or any simulation thereof.

C. Any person, firm or corporation convicted for violating this ordinance shall be fined not more than $500.00 and sentenced to imprisonment for a period not

exceeding six months, at the discretion of the court trying the case.

Adopted: FEB 6, 1996

/s/ Glendi A. Morgan

City Clerk